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Criminal Intent and Bigamy

IN THESE DAYS when divorces are numerous, and are sometimes obtained so speedily and carelessly that they are illegal, or when legal are sometimes followed by marriages contracted in such unseemly haste that the marriages are ineffective, it may be of interest to see whether or not a marriage contracted with no intent to violate the law, although a valid prior marriage is still existent, is a crime. This problem is of particular interest in California since the Supreme Court of that state in the recent case of In re Ahart[1] by way of dictum used some language apparently inconsistent with the rule contained in the leading California case of People v. Hartman.[2]

The specific question here involved is as follows: is the innocent belief of a person previously married that he is unmarried and legally competent to remarry, a good defense to a prosecution under the bigamy statute when he remarries, his previous marriage being still valid and in full force and effect?

Remarriage under such conditions takes place only because the person remarrying has assumed a wrong state of facts or because he has drawn a wrong inference as to the law governing a known state of facts, in other words, because of either a mistake of fact or one of law.

There are four possible situations in which these mistakes occur:

Where one spouse believing that the marriage has been ended by the death of the other, remarries, whereas the other spouse is still living;

Where one of the matrimonial partners believes that legal proceedings have been taken which led to the dissolution of the marriage, whereas no such proceedings were ever taken;

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[1] (1916), 172 Cal. 762, 159 Pac. 160.
[2] (1900), 130 Cal. 487, 62 Pac. 823.

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Where one party to a marriage believes that the marriage relation has been ended, because a divorce was obtained which he believes to be valid, or because of an agreement to separate, or because of the desertion of the other spouse, or because of some other combination of circumstances;

Where a person who has been married honestly believes that the marriage was invalid, and that he is therefore able to contract another marriage, whereas the first marriage was valid.

As can be seen from analysis of these situations, the first two mistakes are mistakes of fact, and the last two are mistakes of law.

In this discussion we shall not give any especial consideration to the case of a defendant who has violated the bigamy statute in utter ignorance of there being any law against plural marriages, as for instance a Mohammedan contracting a bigamous marriage while making a short stay in this country. This would present a clear case for the application of the maxim *ignorantia legis non excusat,* which all will admit should be applied here. This statement will relieve us from further considering the question raised by Professor Keedy in the Harvard Law Review[3] as to whether there is any distinction between ignorance of law and mistake of law, and the effect of any such distinction.

The question under consideration has been answered in three different ways: One line of cases holds that, where a statute simply declares that any person who marries another person when he has a spouse living, is guilty of bigamy, any person voluntarily doing the act forbidden by the letter of the statute is to be held guilty of the crime of bigamy, since the legislature made no exception in favor of persons honestly believing that they did not have a spouse living. The leading western case representing this view is the case of People v. Hartman,[3a] which is noticed and criticised by a prominent jurist in 3 California Law Review, 452.[4]

Another view is that absence of intent to do wrong is a good defense in bigamy prosecutions, which may be evidenced by showing a mistake of fact causing the crime, but if the mistake is one of law it is never a sufficient defense. One of the latest expressions of this view is the dictum of the California Supreme

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[3] "Ignorance and Mistake in the Criminal Law," by Prof. Edwin R. Keedy, 22 Harvard Law Review, 75.

[3a] Supra, n. 2.

[4] "Changing Conceptions of Law and of Legal Institutions," by Pro-

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Court in the case of In re Ahart,[4a] in which it was considering a violation of a liquor ordinance. Judge Henshaw, speaking for the court, said:

> "Therefore, we do not construe section 5 of the Covina ordinance as designed to inflict punishment upon an innocent person who shall so transport intoxicants. The case comes quite clearly within the reasoning and principle of the English case of *Regina v. Tolson,* which case itself receives detailed consideration in 2 Lewis' Sutherland Statutory Construction, sec. 527. The case was a criminal charge against a woman for a bigamous marriage.
>
> "It has been held that one who marries a second time under an honest but erroneous belief that a decree of divorce which had been granted was valid is afforded no protection by the invalid decree, and that evidence of his good faith will be excluded. But in the later Tolson case the woman had married five years instead of seven years after her husband's desertion of her under the belief held in good faith that her husband was dead. The proposition considered was whether honest belief and good faith constituted a defense. It was conceded that the prisoner 'falls within the very words of the statute.' Cave, J., said: 'At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which the person is indicted an innocent act, has always been held to be a good defense. . . . . So far as I am aware it has never been suggested that these exceptions do not equally apply to the case of statutory offenses unless they are excluded expressly or by necessary implication.' "

This dictum of the California Supreme Court is apparently inconsistent with its language in People v. Hartman, and because of this, it is proposed, a little later in this discussion, to examine the whole subject of bigamy rather fully in an effort to ascertain the true rule.

The third view is that if the state shows such facts as make out a prima facie case of voluntary violation of the bigamy statute the intent to do the act may be presumed, but the defendant should be allowed to show that he violated the statute under a mistake of fact as to the termination of a prior marriage. In other words, the presumption of criminal intent arising from such facts should be rebuttable by showing the mistake of fact above

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fessor Orrin K. McMurray, 3 California Law Review, 441.

[4a] Supra, n. 1.

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mentioned and not conclusive as under the first view. This view is adopted by the writer of the annotated note to Baker v. State, in Lawyers' Reports Annotated,[5] citing State v. Cain,[6] and Robinson v. State.[7] We shall endeavor to show further on that this writer has fallen into the common error of confusing the intent to commit the act and the intent to violate the law. He recognizes that the criminal intent under the usual bigamy statute is only the intent to do the act. If this is the only intent required to be shown, proof of mistake of fact not negativing that intent is immaterial, because at most it only shows absence of intent to violate the law.

In discussing the effect of an innocent mind as a defense to a prosecution for a statutory offense we must first ascertain what the mens rea under a given statute is. One of the best known maxims of criminal law is: *"Actus non facit reum nisi mens sit rea,"* expressing the general rule that to constitute a crime there must be unity of act and intent.

At this point it will be wise to see just what criminal intent or mens rea means. These phrases are good illustrations of Justice Holmes' epigram contained in the recent case of Towne v. Eisner,[8] which was as follows:

> "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

Justice Stephen in Regina v. Tolson,[9] well points out the many different and confusing meanings mens rea has in the following words:

> "Though this phrase is in common use, I think it most unfortunate, and not only likely to mislead, but actually misleading, on the following grounds. It naturally suggests that, apart from all particular definitions of crimes, such a thing exists as a 'mens rea', or 'guilty mind', which is always expressly or by implication involved in every definition. This is obviously not the case, for the mental elements of different crimes differ widely. 'Mens rea' means in the case of murder, malice aforethought; in the case of

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[5] (1910), 27 L. R. A. (N. S.) 1097.
[6] (1902), 106 La. 708, 31 So. 300.
[7] (1909), 6 Ga. App. 626, 65 S. E. 792.
[8] (1918), 245 U. S. 418, 38 Sup. Ct. Rep. 158.
[9] (1889), 23 Q. B. D. 168.

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> theft, an intention to steal; in the case of rape, an intention to have forcible connection with a woman without her consent; and in the case of receiving stolen goods, knowledge that the goods were stolen."

The true rule is, it is submitted, the one laid down in the same case by Justice Stephen where he says: "the full definition of every crime contains expressly or by implication a proposition as to a state of mind." This definition has been adopted in the Criminal Responsibility Bill approved by the Institute of Criminal Law and Criminology, and by the Conference on Medical Legislation of the American Medical Association.[10]

The terms mens rea and criminal intent are further confusing because they cover two kinds of intent, general intent and specific intent. By general intent is meant simply the intent to do the act prohibited and by specific intent may be meant various things, such as, intent to violate the law, covered by the words, "feloniously", "unlawfully", "wilfully" and "knowingly"; or intent to steal; intent to burn; malice aforethought; and so on. Professor Beale states the difference as follows:

> "The distinction between a required specific intent and the general intent dealt with in the preceding section is this. The general intent, required in all crimes, is an intention to do the act done; and there is no need of an independent averment of it, since it would be naturally understood. The specific intent is some independent mental element which must accompany the physical act in order that the crime in question may be committed; it is an element of many but not of all crimes. An allegation of the act alone would not sufficiently charge such a crime; and it is therefore imperative that the specific intent should be explicitly stated. On this principle, if the offense must be done maliciously, wilfully or knowingly, the malice, intention or knowledge must be expressly averred."[11]

It is recognized that this classification is slightly different from that contained in several of the well known text books. A common way of treating the classification of criminal intent has been to say that all the common law crimes contain the element of criminal intent, but that it is inferred from the commission of the offense, and that some crimes contain as an

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[10] See "Insanity and Criminal Responsibility," by Prof. Edwin R. Keedy, 30 Harvard Law Review, 535.

[11] Beale's Criminal Pleading and Practice, § 136.

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essential element a specific intent such as intent to steal, malice aforethought and the like, which must be alleged and proved. Then in dealing with statutory offenses which are silent as to intent it is said that in many cases application of familiar rules of statutory construction will show that the intent with which an act is done is immaterial, in other words that criminal intent is not an element of such offenses.

Mr. Bishop in his able book on Criminal Law[11a] contends that all statutes must be construed in the light of the common law and that at common law the mens rea was always an element of every crime. From that he reasons that the showing by a defendant that his mind was innocent, that is, that he intended no wrong when he committed the act, should always be a good defense.

These two views are both illustrations of the erroneous results that may flow from not recognizing the fact that there are various kinds of criminal intent differing greatly from each other.

The textbooks were correct in stating that criminal intent is immaterial in certain statutory offenses, if we consider that the phrase "criminal intent" is used by them to mean intent to do wrong or intent to break the law. If "criminal intent" were used by them in the general sense of intent to do the prohibited act, various absurd and unsound results would follow. If no criminal intent had to exist as an element of a crime it would have to follow that the state of a defendant's mind while committing a crime would be immaterial and then the question would arise, whether the general rule that insanity is a complete defense would apply. The effect of showing insanity is to negative the existence of any criminal intent and if criminal intent is said to be immaterial in any case then it would seem meaningless to allege or prove insanity as a defense. The same result would apparently have to follow even though a person committed a crime entirely accidentally.

While some criminal intent is usually required certain statutory offenses do not require proof of any intention to transgress the law for the conviction of an offender coming within the letter of the statute. Whether the intent to do wrong is a necessary element of a statutory offense is a matter of construction to be determined from the nature of the offense, the

[11a] Bishop's New Criminal Law (8th ed.), §§ 303a, 304 and notes.

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evil intended to be corrected and the punishment involved, as well as from the language of the statute, thus ascertaining the intention of the legislature.

As was well said in Commonwealth v. Weiss:[12]

> "Whether a criminal intent, or a guilty knowledge, is a necessary ingredient of a statutory offense, therefore, is a matter of construction. It is for the legislature to determine whether the public injury threatened, in any particular matter, is such, and so great, as to justify an absolute and indiscriminate prohibition."

To ascertain the intention of the legislature we must consider several elements; the nature of the offense, the evil sought to be remedied, the penalty and the language of the statute.

As was said before, statutory offenses can be divided into those requiring a general criminal intent and those requiring a specific criminal intent. When the statute is silent on the subject of intent, as it often is, the nature of the crime must be analyzed. If it is one of those offenses which involve some amount of moral turpitude, which have been generally considered as wrong by society, and which carry with them a prison punishment, it is safe to say that such statutory offenses require a specific criminal intent to accompany the act unless the legislature clearly indicates to the contrary.

However, if it is one of those offenses which Justice Wright, in Sherras v. De Rutzen,[13] described as "acts which are not criminal in any real sense, but which in the public interest are prohibited under a penalty", such as the sale of adulterated food, sale of oleomargarine with coloring matter in it, and sale of intoxicating liquors, only the intent to do the prohibited act need be shown in order to obtain convictions.

As the California bigamy statute is the common type of statute on this subject, we shall consider its language. It provides:

> "Every person having a husband or wife living, who marries any other person, except in the cases specified in the next section, is guilty of bigamy.[14]
>
> "The last section does not extend—
>
> 1. To any person by reason of any former marriage,

[12] (1891), 139 Pa. 247, 21 Atl. 10. See also People v. O'Brien (1892), 96 Cal. 171, 31 Pac. 45.

[13] (1895), 1 Q. B. D. 918.

[14] Cal. Pen. Code, § 281.

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whose husband or wife by such marriage has been absent for five successive years without being known to such person within that time to be living; nor,

2. To any person by reason of any former marriage which has been pronounced void, annulled, or dissolved by the judgment of a competent court."[15]

This language is particularly significant in that the words "knowingly" and "wilfully" do not appear in this statute, these being the words which are ordinarily used in statutes to indicate that the intent to violate the law is an essential element of the offense, although their absence is not conclusive on this point.[16]

Of especial significance in California is the legislative history of this statute. The Crimes and Punishment Act reads as follows:

"Bigamy consists in the having of two wives or two husbands at one and the same time, knowing that the former husband or wife is still alive."[17]

Under the Crimes and Punishment Act, the specific intent, "knowing that the former husband or wife is still alive", was an essential part of the offense and this intent had to be proved. When the legislature altered the wording of this statute in 1872 so as to leave out of consideration the knowledge as to the other spouse's existence it must be presumed it did so for a purpose,[18] and that purpose was to make the act of remarriage while the other spouse was still alive a crime irrespective of defendant's innocent belief or non-negligent lack of knowledge, the intent to do the act being the only intent required.

It is also to be noted that section 282 of the Penal Code of California sets forth two combinations of circumstances under which remarriage while the other spouse is living, is not bigamy; absence of the other spouse for five years without being known

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[15] Cal. Pen. Code, § 282.

[16] Reg. v. Prince, L. R. 2 C. C. 154.

[17] Section 121, Crimes and Punishment Act of California, Cal. Stats. 1850-3, p. 662.

[18] Reed v. Goldneck (1905), 112 Mo. App. 310, 86 S. W. 1104; In re More's Estate (1914), 179 Mich. 237, 146 N. W. 319; Ex parte Welborn (1911), 23 Mo. 297, 309, 141 S. W. 31. While this presumption is a rule of statutory construction, still as a matter of history it is safe to say that, while the codifiers made the change in the law consciously, the legislature in the confusion of adopting several codes bodily did not appreciate the change they were effecting.

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to the party remarrying to be living, and the ending of the marriage relation by a competent court.

The maxim, *"expressio unius est exclusio alterius"*, might well be applied here to indicate that the above mentioned exceptions to the statutory definition of bigamy are the only ones intended by the legislature. As is said by the Supreme Court of Colorado in Schell v. People:[18a]

> "The prevailing view in the United States is that it is the clear intent of the statutes that one who marries within the period designated by the statute shall do so at his peril."

This proviso, which is substantially the usual proviso found in bigamy statutes, it must be admitted, is the source of much doubt and difficulty. Justice Cave, in Reg. v. Tolson, very ably makes the ingenious argument that because, as must be admitted, the usual common law defenses of insanity, infancy and compulsion obtain in bigamy even though not specified as a defense in the statute, that therefore the statutory proviso is intended to be broader than the general common law exception of insanity, and is not inconsistent with nor intended to exclude the defense of mistake of fact as showing lack of intent to violate the law. It seems to us that the learned Justice's construction, while very plausible, is unsound, in that he confuses the nature of these defenses with that of the defense of mistake of fact when he assumes they are similar, and that thereby he has fallen into error. On reflection it will be admitted that insanity, infancy and compulsion are universal defenses not dependent on the intention of the legislature nor ever expressed in a statute. On the other hand mistake of fact is not a universal defense in statutory offences, and the presence or absence of intent to violate the law as an essential element in statutory offenses depends on the intention of the lawmakers which can only be determined by applying the usual rules of statutory construction.

Since mens rea therefore is a matter of construing the statute, it is submitted that we are limited to the usual methods of construction, namely, studying the wording of the statute, the nature of the crime, the penalty and the conditions the statute is intended to affect. Since statutes are to be construed as a whole it is

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[18a] (1918), 173 Pac. 1141.

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rather illuminating to note that under section 284 of the Penal Code of California it is provided that "every person who knowingly and wilfully marries" a bigamist, is guilty of a criminal offense. Considering the language of the statute alone it would seem clear that the legislature intended to disregard the element of intent to violate the law. Next considering the nature of the offense and the michief sought to be repressed we find that bigamy has been abhorred and severely punished for centuries.

That the statutory offense of bigamy is not merely a police regulation passed by the legislature in the exercise of its police power, but is an offense evil of itself, or *malum in se* as expressed by some, is clear when the history of bigamy in the common law is considered. Bigamy was at first an ecclesiastical offense in England, and any person guilty of it was deemed incapable of taking orders and was without benefit of clergy. This was recognized by the statute of 4 Edward I, and bigamy was made a felony in England in the reign of James the First. The church punished bigamy as immoral and shocking the conscience, and then the state made it a felony for the same reason.

Chancellor Kent gives a very good account of the history and nature of bigamy in his Commentaries, where he says:

> "The direct and serious prohibition of polygamy contained in our law is founded on the precepts of Christianity, and the laws of our social nature, and it is supported by the sense and practice of the civilized nations of Europe. Though the Athenians at one time permitted polygamy, yet, generally, it was not tolerated in ancient Greece, but was regarded as the practice of barbarians. It was also forbidden by the Romans throughout the whole period of their history, and the prohibition is inserted in the Institutes of Justinian. Polygamy may be regarded as exclusively the feature of Asiatic manners, and of half-civilized life, and to be incompatible with civilization, refinement, and domestic felicity."[19]

Davis v. Beason,[20] contains the view of the United States Supreme Court as to the criminal nature of bigamy. The court said in part:

> "Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the

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[19] 2 Kent Comm. 81.

[20] (1890), 133 U. S. 333, 33 L. Ed. 637, 10 Sup. Ct. Rep. 299. See also Reynolds v. United States (1878), 98 U. S. 145, 25 L. Ed. 244.

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> laws of the United States, and they are crimes by the laws of Idaho. They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment."

From these authorities it is clear that bigamy is not a violation of a mere police regulation but is a crime involving moral turpitude. This being so, in the absence of statutory language which is controlling, this offense should be considered as involving the specific intent of consciously violating the law. It must be remembered however that the nature of the crime is not the controlling element in ascertaining the intent involved, but is only one of several factors to be considered.

The probable intention of the legislature and the reasons underlying it are best summed up by Chief Justice Shaw in the case of Commonwealth v. Mash,[21] where he says:

> "It appears to us, that in a matter of this importance, so essential to the peace of families and the good order of society, it was not the intention of the law to make the legality of a second marriage, whilst the former husband or wife is in fact living, depend upon ignorance of such absent party's being alive, or even upon an honest belief of such person's death. Such belief might arise after a very short absence. But it appears to us, that the legislature intended to prescribe a more exact rule, and to declare, as law, that no one should have a right, upon such ignorance that the other party is alive, or even upon such honest belief of his death, to take the risk of marrying again, unless such belief is confirmed by an absence of seven years, with ignorance of the absent party's being alive within that time."

From our study of the language of the bigamy statute, the nature of this crime, and the mischief sought to be prevented, the question remains just what intent does the bigamy statute require to be proved. The answer to this question depends of course upon the particular statute being considered and the correct construction of that statute. Where we are considering such a statute as the one in California and others similar to it, it is submitted, the intent required is merely the intent to do the act which is inferred from the voluntary doing of the act, and

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[21] (1844), 7 Metc. 472.

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not the intent to violate the law. This is pointed out by Chief Justice Shaw in Commonwealth v. Mash, where he says:

> "Whatever one voluntarily does, he of course intends to do. If the statute has made it criminal to do any act under particular circumstances, the party voluntarily doing that act is chargeable with the criminal intent of doing it."

As the learned Chief Justice indicates, the act of marriage under the prohibited circumstances must be voluntary, in other words, must be his own act as distinguished from the act of some other person done through him as an involuntary agent, and any other interpretation of the phrase "criminal intent" in this connection, is eliminated by Chief Justice Shaw.

The weight of authority in the United States is to the effect that the only criminal intent essential to the crime of bigamy, is the intent to do the prohibited act, and California and Nevada are among those in accord with the general rule.[22] As the California Supreme Court very clearly put it in the case of People v. Hartman:[22a]

> "If defendant, by reason of being unconscious, did not know what he was doing when he contracted the second marriage, then this case is similar to the Harris case. But here the defendant did know exactly and fully what he was doing when he married the second time; and it was the act of marrying the second time that constituted the crime, for, as we have seen, he had another wife living when he contracted the second marriage. The intent of defendant, as referred to in the code, is the intent to do the act, namely, contract the marriage. It does not refer to any intent to violate the law."

In other words all that is necessary is to contract the marriage under the forbidden circumstances voluntarily, and the innocence of mind of the person embarking on another matrimonial voyage is immaterial, thus ignoring the specific intent of intending to violate the law, which the California legislature intended should be ignored in this crime.

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[22] Supra, n. 2; State v. Zichfeld (1896), 23 Nev. 304, 46 Pac. 802; State v. Trainer (1911), 232 Mo. 240, 134 S. W. 528; Rand v. State (1901), 129 Ala. 119, 29 So. 844; Parnell v. State (1906), 126 Ga. 103, 54 S. E. 804; Cornett v. Commonwealth (1909), 134 Ky. 613, 121 S. W. 424; Commonwealth v. Hayden (1895), 163 Mass. 453, 40 N. E. 846; State v. Goulden (1904), 134 N. C. 743, 47 S. E. 450; State v. Ackerly (1906), 79 Vt. 69, 64 Atl. 450; People v. Spoor (1908), 235 Ill. 230, 85 N. E. 207.

[22a] Supra, n. 2.

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This rule is not as unjust as it might seem because in the case of a remarriage after the disappearance of the other spouse the law specifies a certain period after which the remarriage can safely take place, and in other cases if the party remarrying takes the precautions the seriousness of his step calls for he will seldom transgress even the letter of the law. As the court stated in Staley v. State:[23]

> "In civil controversies involving property rights only, individuals often refuse to act without an order of court; but, if the evidence on behalf of the state is believed, defendant, on the mere advice of counsel that his marriage was void, was willing to abandon his wife as an adultress, and leave her with the prospect that she would become the mother of a bastard child. The obligations of one who has voluntarily entered into the marriage relation require a greater degree of care than that exercised by defendant. He acted on the advice of counsel at his peril, and under the law it is no defense in this case."

In real cases of injustice there still remain the remedies of probation, nominal sentences, and pardons.

The second view referred to in the beginning of this article is that an honest mistake of fact causing a violation of the terms of the bigamy statute is a good defense. This doctrine is followed in England,[24] Canada,[25] the Philippine Islands,[26] and in a few of the American states.[27] The fundamental theory underlying this doctrine is that the legislature purposely required the specific intent of intending to violate the law to be proved as an element of bigamy, and that when it appears that the remarriage was made under a mistake of fact such specific intent is negatived.

In California and in Arizona[28] the Penal Codes mention mistake of fact as making a person incapable of committing a

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[23] Staley v. State (1911), 89 Neb. 701, 131 N. W. 1028.

[24] Supra, n. 9.

[25] Reg. v. Smith, 14 U. C. Q. B. 568.

[26] United States v. Biasbas (1913), 25 Philippine 71; United States v. Reyes (1902), 1 Philippine 375.

[27] State v. Stank, 9 Oh. Dec. 8; Leseuer v. State (1911), 176 Ind. 448, 95 N. E. 239; Squire v. State (1874), 46 Ind. 459; Baker v. State (1910), 86 Neb. 775, 126 N. W. 300; Welch v. State (1904), 46 Tex. Cr. App. 528, 81 S. W. 50; Watson v. State (1904), 13 Tex. App. 76. Note—The Texas cases were decided under a statute making a mistake of fact a good defense in all crimes.

[28] Cal. Pen. Code, § 26; Ariz. Pen. Code, § 24.

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crime because the mistake disproves any criminal intent. The California provision reads as follows:

> "All persons are capable of committing crimes except those belonging to the following classes:
>
> * * * * * * * *
>
> (4) Persons who committed the act or made the omission charged under an ignorance or mistake of fact which disproves any criminal intent."

The last part of this section, "which disproves any criminal intent", must be taken to mean criminal intent in the sense of guilty knowledge, because mistake of fact does not necessarily disprove the intent to do the act prohibited. The Arizona case of Troutner v. State,[29] in construing the Arizona section as to mistake of fact adopts this construction in the following words:

> "This clearly has reference to crimes in which 'criminal intent' or guilty knowledge is an essential ingredient. It is manifest by the language itself as also by the whole context of section 24. The other 'persons' mentioned in section 24 as incapable of committing crimes are children under fourteen years of age, not knowing the wrongfulness of their acts, and idiots, lunatics, and insane persons, etc., —persons incapable of having or entertaining a criminal intent. Persons of sound mind and unquestioned mental competency, and therefore capable of committing crimes, may, in those cases in which a criminal intent is essential, plead as a defense ignorance or mistake of fact for the purpose of disproving any criminal intent. They are, for the purposes of their defense, placed in the same category with persons mentally incompetent to form a criminal intent, but, in that class of acts the mere doing of which is made by law the crime regardless of the purpose or intent, persons of sound mind are not entitled to immunity because of ignorance or mistake of fact. Therefore subdivision 4 can only have reference to those crimes in which a 'criminal intent' is necessary."

In Texas a statute, which plainly purports to make mistake of fact a good defense to all crimes alike, has been construed to apply to all crimes including bigamy; even though the bigamy statute is silent as to intent.[30]

Most of the decisions expressly indicate that only a mistake

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[29] (1916), 17 Ariz. 506, 154 Pac. 1048.
[30] Watson v. State, supra, n. 27.

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of fact can negative this specific intent, but many of them base their reasoning very generally on the doctrine that an innocent mind is a good defense. In all the writer's research however he has not been able to find a single case where an honest mistake of law causing a breach of the bigamy statute has been allowed as a defense, while all the cases of bigamy involving a mistake of law have held it was not a good defense.[31] It is the stringently enforced general rule that a mistake of law is not a defense to criminal offenses. The only exception is where a mistake of law is shown to negative a specific intent which is required in some crimes.[32]

This exception to the rule theoretically should be available to defendants in jurisdictions where mistake of fact is a good defense. As has been shown the defense of mistake of fact is only material where the specific intent of intending to break the law is an essential element of the crime. Accordingly where a defendant shows a mistake of law which establishes that he was innocent of any intention of wilfully transgressing the law, the jurisdictions recognizing mistake of fact as a defense should, to be consistent and logical, acquit a defendant proving a mistake of law. That the courts have treated these two mistakes so differently is due probably to their failure to recognize that the intention to be a law-breaker is a specific intent and not merely a general intent. The main reason the courts have been blind to this is probably their intense reluctance to ever recognize mistake of law as a defense to a criminal prosecution.

In taking up the third doctrine obtaining on this subject, namely, that proof of the violation of the statute should only raise a rebuttable presumption of criminal intent on the part of the defendant and that he should be allowed to rebut the presumption by proof of a mistake of fact, the writer will first

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[31] People v. Hartman, supra, n. 2; State v. Zichfeld, supra, n. 22; McConico v. State (1873), 49 Ala. 6; Commonwealth v. Hayden, supra, n. 22; People v. Weed (1883), 29 Hun. 628; State v. Robbins (1845), 28 N. C. 22; Medrano v. State (1893), 32 Tex. Cr. 214, 22 S. W. 684; The King v. Brinkley (1907), 14 Ont. L. 434; State v. Hughes (1882), 58 Iowa 165, 11 N. W. 706; State v. Goodenow (1876), 65 Me. 30; State v. Armington (1878), 25 Minn. 29; Russell v. State (1899), 66 Ark. 185, 49 S. W. 821; Staley v. State, supra, n. 23; Davis v. Commonwealth (1911), 13 Bush. 318.

[32] May's Criminal Law (3rd ed.), § 52; Rex. v. Hall, 3 C. & P. 409; Reg. v. Reed, Car. & M. 306; Commonwealth v. Stebbins (1857), 8 Gray (Mass.) 492; Reg. v. Towse (1879), 14 Cox C. C. 327; United States v. Conner (1845), Fed. Cas. No. 14, 847.

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consider the cases cited in support of this view in some detail.

The case of State v. Cain,[32a] does support the view outlined, and the conclusions of the court are stated in paragraphs 3 and 5 of the syllabus prepared by it as follows:

> "If a statute has made it criminal to do any act under particular circumstances, the party voluntarily doing that act is chargeable with the criminal intent of doing it", citing Com. v. Mash, 7 Metc. 472; 4 Am. & Eng. Enc. Law, p. 40, note; and,
>
> "Where a defendant, prosecuted for bigamy, undertakes to defend by showing that he contracted the second marriage in the honest belief that the first had been dissolved by a decree of divorce, the burden of proof rests upon him to show that he had reasonable grounds (his mental capacity and surroundings considered) for such belief, and that he did in fact so believe. It is not enough that he should merely create a doubt upon that subject in the minds of the jury."

However this case is inconsistent in approving the case of Commonwealth v. Mash, which expressly holds that any intention other than intending to do the act forbidden is immaterial and that no evidence is admissible to show a mistake of fact. Furthermore this case is from Louisana, a civil law jurisdiction.

Robinson v. State[32b] is not in point and can be dismissed from further consideration because the Georgia Penal Code of 1895[33] expressly defines bigamy as "knowingly having a plurality of husbands or wives at the same time," thereby expressly recognizing the absence of intent to do wrong to be a good defense.

The learned writer of the note referred to has unwittingly fallen into an inconsistency due to confusing the various kinds of criminal intent. He says:

> "The American courts, although falling into error further on, have for the most part adopted the other and more reasonable view, that the inference from the failure of the legislature expressly to specify the mental element involved in the crime of bigamy is that *no other guilty intent is to be considered as an element of the crime than that which may be inferred from the voluntary doing of the particular act.*"[34]

Note that he unqualifiedly says that the only intent to be

[32a] Supra, n. 6.
[32b] Supra, n. 7.
[33] Penal Code of Georgia (1895), § 376.
[34] 27 L. R. A. (N. S.) 1098, n.

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shown is the intent connected with voluntarily doing an act. Every one is constantly doing things which he would not do if the facts were contrary to what he supposed them to be, but his acts are none the less voluntary even though done because of a mistake of fact. The mistake of fact only goes to the quality of the mind accompanying or the motive leading up to the act, but it does not negative the intent to do the act, the only intent we are interested in. However later he goes on to say that it is unfortunate that the courts did not hold "that where the contracting of a second marriage during the lifetime of a former spouse is shown, the burden of proof shifts to the defendant to disprove the guilty intent which might otherwise be supposed to exist, by showing an honest mistake of fact on his part with respect to the termination of the former marriage by death or legal divorce."[35] This would at most show only the underlying motive or ethical quality of the defendant's mind and would no whit detract from the deliberateness of the second marriage. How then is it material in view of the assertion that the only intent to be considered is "that which may be inferred from the voluntary doing of the particular act"?

All that can be shown in defense of bigamy, where the statute does not require a specific intent, is that the defendant was not acting voluntarily. This could be shown by proof that defendant acted while drugged, hypnotized or under compulsion. Occasionally a mistake as to some of the facts might conceivably show that the defendant did not intend to commit the act prohibited. If the defendant in a spirit of fun should pretend to marry one whom all believed to be a man but who really was a woman in disguise, or if at a mock marriage he should be married by one whom all believed to be a layman, whereas he really was a minister or magistrate, it would be clear that he did not intend to do the act prohibited, namely, to marry a woman while he still had a wife living. The marriages above mentioned could of course only occur where there are no statutory requirements as to marriage licenses and persons solemnizing marriages, or where such requirements are held to be only directory and not mandatory.[36]

However in the language quoted from the note, the mistakes

[35] 27 L. R. A. (N. S.) 1099, n.
[36] 26 Cyc., p. 840.

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of fact did not have any bearing on the only intent we can consider, namely, the intent to commit the act of marriage. The third doctrine would be sound if it were clearly understood that the only matters the defendant could introduce to rebut the presumption of guilt following from proof of the act, would be those going simply to the voluntary nature of the defendant's act of remarriage.

In closing it may be well to point out that while the language in In re Ahart, and the dictum in People v. Hartman are apparently inconsistent, still the cases are not necessarily inconsistent. In the Hartman case the mistake was as to the validity of a "common law" marriage, the defendant believing it to be invalid, whereas in the Ahart case, both that case and the dictum quoted from Regina v. Tolson considered mistakes of fact. As has been pointed out earlier the cases almost unanimously recognize and enforce the distinction between a mistake of fact and a mistake of law, holding that the former in many cases excuses while the latter never does, unless it negatives a specific intent which is an essential element of a particular offense.

We have throughout endeavored only to state fairly and impartially the various doctrines which govern this vexatious question, and it is difficult to lay down any hard and fast rule which shall govern all cases. The problem must be solved by applying the usual rules of statutory construction. Proper construction of the statute will determine whether under any given statute only a general intent is required to be shown or whether a specific intent is also an essential element. It is believed that under the Massachusetts and the present California acts only the intent to do the act prohibited is involved. Under the Georgia and first California acts on the other hand a specific intent was also required to be proved, namely, knowledge that the first spouse was still living. Other statutes may require the mental element of intending to break the law or some other specific intent. Since bigamy is a serious criminal offense and involves long sentences, the courts should, where not controlled by statutory language, require proof of conscious wrongdoing.

Some people may say that it is unjust under acts like the present California act to convict a person of bigamy who, after the estate of his spouse had been probated, remarried while his spouse was still alive, he in common with all others believing

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her to be dead. To such persons we can only say as the United States Supreme Court said in United States v. Caminetti:[37]

> "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms."

The Supreme Court did not go on and say, as it might also have said, that, if the enforcement of an act according to its terms seems harsh, that is a matter for the legislature and not for the courts.

Delger Trowbridge.

San Francisco, California.

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[37] Caminetti v. United States (1917), 242 U. S. 470, 61 L. Ed. 442, 37 Sup. Ct. Rep. 192.

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The Distinction Between Statutory and Common Law Bonds in California

THE increasing importance of the law applicable to surety bonds is emphasized by every new edition of the statutes of California. Each new regulation of business attempted by the legislature and each new enterprise undertaken by the government invariably requires the execution of new surety bonds to safeguard public and private interests. And with the increasing importance of this law, the problems contributing to its growth have become more complex. The magnitude of many of these obligations as well as considerations of convenience have made corporate bonds preferable to undertakings executed by individuals. Large surety companies, through the agency of talented and astute counsel, have for some time past been testing their liability in the courts under a great variety of circumstances, and much learning has brought forth many subtle distinctions. Any attempt, therefore, to define principles which should lie at the foundation of this law, should be of more than academic value.

In California the term "statutory bond" is a label of very doubtful meaning. As distinguished from "common law bond" it is a term frequently used by the courts, but a study of the ways in which it is used leads inevitably to considerable perplexity. Yet it obviously connotes so important a distinction that its proper classification merits some study. An examination of California cases in which this term has been employed seems to indicate that it has been used in at least two different senses.

Where a statute requires a bond to be executed as a condition precedent to the exercise of some right or privilege, or the doing of some act, by the principal obligor, then such bond is said to be a "statutory bond." Under such circumstances it seems to be conclusively presumed that the bond would not have been executed but for the compulsion of the statute. The result is that where the statute requiring such bond is held unconstitutional, or where such statute is held to have no application

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to the situation presented, the bond is declared to have been given without consideration and to be void. An illustration of this is found in the line of cases following Shaughnessy v. American Surety Co.[1] Section 1203 of the Code of Civil Procedure, as enacted in 1893, required building contracts to be accompanied by a bond of the contractor in an amount equal to 25% of the contract price, inuring to the benefit of laborers and materialmen, and provided that a failure to execute such bond should render the owner of the property and the contractor jointly and severally liable in damages to such materialmen and laborers as were entitled to liens upon the property.[2] The California Supreme Court in the case of Gibbs v. Tally[3] declared that so much of this section as required a bond was unconstitutional. The court in the Shaughnessy case, in an action upon a bond given pursuant to section 1203, denied recovery, saying:

> "This bond was given to secure a statutory privilege upon conditions to its enjoyment imposed by the statute, but the privilege was a constitutional privilege, which could not be interfered with by statute. The undertaking was therefore wholly without consideration and void."

This decision was subsequently approved in other cases arising upon similar facts.[4]

So, also, in the earlier case of Coburn v. Townsend,[5] the same rule was applied. There a plaintiff in condemnation proceedings was allowed, by order of the trial court, to take posses-

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[1] (1903), 138 Cal. 543, 69 Pac. 250, 71 Pac. 701.

[2] Cal. Stats. 1893, p. 202.

[3] (1901), 133 Cal. 373, 65 Pac. 970, 60 L. R. A. 815.

[4] San Francisco Lumber Co. v. Bibb (1903), 139 Cal. 192, 72 Pac. 964; Same (1903), 139 Cal. 325, 73 Pac. 864; Montague & Co. v. Furness (1904), 145 Cal. 205, 78 Pac. 640; Hampton v. Christensen (1906), 148 Cal. 729, 84 Pac. 200; Martin v. McCabe (1913), 21 Cal. App. 658, 132 Pac. 606. In all of these cases action was brought on a bond given pursuant to Cal. Code Civ. Proc., § 1203, and in each recovery was denied on the ground that the provision requiring the bond was unconstitutional, and the bond was without consideration.

Cf. Alaska Improvement Co. v. Hirsch (1897), 119 Cal. 249, 47 Pac. 124, where a common law bond was declared void for the same reason, viz., not supported by consideration. A plaintiff was in this case required by order of the court to give a bond, supposedly to secure the continuance of a temporary restraining order. Recovery on this bond was denied on the ground that it did not "appear that the restraining order was continued in force at all by reason of the bond, or that by giving it the plaintiff in the injunction suit gained any advantage whatever. The order requiring the bond did not make the continuance of the restraint conditional upon giving the bond. . . ."

[5] (1894), 103 Cal. 233, 37 Pac. 202.

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sion of the lands claimed at the commencement of the proceedings, upon giving a bond pursuant to section 1254 of the Code of Civil Procedure as it stood prior to 1880. Action was subsequently brought on this bond and recovery denied, the court declaring that the provision of the Code prescribing such a bond was unconstitutional, and the bond itself void.

A familiar illustration of the same rule is found in a line of cases beginning with People v. Cabannes,[6] decided in 1862, which hold that where a bond is given to stay the execution of a judgment pending appeal, such bond is without consideration and no recovery will be allowed thereon, where it appears that execution might not have issued even though no bond had been given. Thus in Powers v. Chabot[7] an appeal had been taken from a decree foreclosing a chattel mortgage and two bonds given by the appellant: one the ordinary appeal bond in the sum of three hundred dollars, and the other a stay bond in double the amount of the judgment. In an action on the stay bond recovery was denied, the court, after deciding that the appeal bond alone was sufficient to have stayed execution, saying:

> "The undertaking was not given in pursuance of any agreement between the parties, but simply to secure a statutory privilege. It did not have that effect, and was therefore wholly without consideration and void, and could not be valid as a common-law undertaking."

In like manner the same rule was applied in the notable case of Loop Lumber Co. v. Van Loben Sels.[8] There Van Loben Sels had contracted with the City and County of San Francisco to construct a sewer, and, believing that the Bond Act[9] governed the proceedings, gave a bond inuring to the benefit of materialmen and laborers in the sum of $41,000, as required by section 1 of that Act. Action was brought on this bond by an unpaid materialman, and judgment in the plaintiff's favor was reversed by the Supreme Court, upon an appeal taken by the surety alone.

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[6] (1862), 20 Cal. 525; Whitney v. Allen (1862), 21 Cal. 233; Powers v. Crane (1885), 67 Cal. 65, 7 Pac. 135; Central Lumber Co. v. Center (1895), 107 Cal. 193, 40 Pac. 334; Reay v. Butler (1897), 118 Cal. 113, 50 Pac. 375; Estate of Kennedy (1900), 129 Cal. 384, 62 Pac. 64; Olsen v. Birch & Co. (1905), 1 Cal. App. 99, 81 Pac. 656.

[7] (1892), 93 Cal. 266, 28 Pac. 1070.

[8] (1916), 173 Cal. 228, 159 Pac. 600.

[9] Cal. Stats. 1897, p. 201, as amended.

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The argument upon which the decision is based is briefly as follows: Section 6, Article XI, of the Constitution of California makes the provisions of a freeholders' charter absolutely controlling in all "municipal affairs"; a contract for the construction of a sewer is a "municipal affair," and for the letting of such a contract the municipality may provide a complete scheme in its freeholders' charter. The City and County of San Francisco had in Article VI of its freeholders' charter provided just such a complete scheme for the letting of such contracts, and had required of contractors a bond conditioned for the faithful performance of the contract, but none for the benefit of materialmen and laborers; therefore the Bond Act, which required a bond for the benefit of materialmen and laborers, and pursuant to which the bond in controversy had been given, was in conflict with such freeholders' charter and entirely inapplicable to these proceedings. Such bond, therefore, having been given solely to comply with the conditions imposed by such Act, was without consideration and void. The court says:

> "We think that it must be concluded in view of the allegations of the complaint that the bond was given solely to secure the right on the part of the contractor to proceed with the performance of his contract with the City and County of San Francisco, on the theory that under the provisions of the act the giving of such a bond was essential before the contractor could proceed with such performance. If for any reason such right to proceed with the work existed independent of said act and could not be affected or impaired thereby, it would seem to follow under our decisions that the bond was without consideration and void."

The foregoing cases illustrate one use of the term "statutory bond."[10] For the sake of brevity these cases will hereafter be classified as type I.

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[10] This rule is carried still further in certain cases which hold that where a "statutory bond" contains certain provisions prescribed by statute and other provisions which the statute does not require to be inserted in the bond, the former will be held valid and the latter void as surplusage. Thus in Miles v. Baley (1915), 170 Cal. 151, 149 Pac. 45, it is said: "The fact that one of the conditions of the bond is that the contractors will faithfully execute the terms of their contract to the satisfaction of the school district—a requirement which is not prescribed by the statute in question—is not conceived to possess any importance in determining the character of the bond. . . . 'Where a statute provides that an official bond shall be given in a certain penalty and contain

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The second sense in which the term "statutory bond" is used by the courts is illustrated by cases which hold that where a statute provides for the giving of a bond, the conditions imposed by such statute on the beneficiary of the bond must be strictly complied with by such beneficiary, if he is to recover on such bond. Thus in Miles v. Baley[11] a bond, inuring to the benefit of materialmen and laborers, had been given by a building contractor upon his contracting to build a school house. Unpaid materialmen and laborers assigned their claims to the plaintiff, who brought action on this bond. The surety company contended that this was a bond given pursuant to the Bond Act,[12] and that the claims sued on had not been filed as required by section 2 of that Act. The court approved of this contention, and recovery against the surety was denied. The court says:

> "Obviously, if the instrument must or could, with legal propriety, be held to be a common-law bond, we would be required to hold that, to state a cause of action upon the bond in favor of the plaintiff, it was not essential for him to disclose by his complaint that his assignors had filed their claims with the board of trustees of said school district, as prescribed by section 2 of the act of 1897. And, *e converso,* if the instrument is a *statutory bond,* it was manifestly essential for the plaintiff to show that all the requirements of the statute, vital to the support of an action upon the bond of materialmen, etc., had been observed by his assignors, and that the silence of the complaint respect-

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certain provisions, if the principal and surety voluntarily enter into a bond in a greater penalty or which contains more onerous conditions, the bond will be binding at least to the extent of the statutory requirements. In such case the conditions in excess of the statutory requirements may be regarded as surplusage and the bond sustained as to the others.' (Brandt on Suretyship and Guaranty, 3d ed., sec. 617; . . . .)"

And in Lambert v. Haskell (1889), 80 Cal. 611, 22 Pac. 327, the court says: "For it is settled that a statutory undertaking beyond what is required by the statute is to that extent without consideration and inoperative. (Powers v. Crane, 67 Cal. 65; People v. Cabannes, 20 Cal. 525). The question is, therefore, what is the undertaking required by statute, and what liability does it impose?"

In People v. Barrett(1907), 6 Cal. App. 578, 92 Pac. 647, a bond, given upon an appeal from a judgment of imprisonment in a criminal case, was held void as a whole, on the ground that its terms were more onerous than required by the statute. This decision can doubtless be distinguished from the two preceding on the ground that here the provisions of the bond were wholly different from the statutory requirements, and not merely part surplusage. Cf. also Hensley v. School District No. 87 (1916), 97 Kans. 56, 154 Pac. 253.

[11] (1915), 170 Cal. 151, 149 Pac. 45.

[12] Supra, n. 9.

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> ing that vital matter amounts to a total failure to state a cause of action upon the bond in favor of the plaintiff or his assignors."

To the same effect is the decision in Republic Iron & Steel Co. v. Patillo,[13] where a plaintiff, who had furnished material for street improvement work, was denied recovery upon a bond given pursuant to section 6½ of the Vrooman Act,[14] on the ground that he had failed to allege and the trial court had failed to find that he had filed a verified statement of his claim with the superintendent of streets within thirty days of the completion of the improvement. So in Hubbard v. Jurian[15] the court refused to permit materialmen, who had not perfected their lien claims in the manner prescribed by the mechanics' lien law, to recover upon a bond given pursuant to section 1183 of the Code of Civil Procedure, saying:

> "The bond was executed in response to the requirements of the statute. It is therefore a *statutory bond* in the strictest sense and under the familiar and well settled rule parties claiming the benefit of the obligation of the bond must show a substantial compliance with the conditions of the statute under which the bond was given."

The theory upon which these cases (which for convenience will hereafter be referred to as type II) are supported seems to be that a surety who executes a bond provided for by statute has a right to assume that all the conditions imposed by the statute upon the beneficiary of the bond will be faithfully performed by such beneficiary. It would doubtless be argued that the terms of the statute under which the bond is given become by implication a part of the surety's contract, or at least that a failure by the beneficiary to observe the conditions imposed upon him by the statute is an inequitable variation of the surety's risk, which will discharge the surety.[16].

The only California decision which attempts to assign reasons

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[13] (1912), 19 Cal. App. 316, 125 Pac. 923.
[14] Cal. Stats. 1885, p. 147, as amended.
[15] (Dec. 31, 1917), 26 Cal. App. Dec. 79.
[16] The argument upon which these cases must be supported is not to be confused with the reason supporting the rule announced in cases which hold that judgment on motion will not be entered upon a stay bond on appeal under Cal. Code Civ. Proc., § 942, unless the bond strictly complies with all the requirements of that section, and such requirements are applicable to the facts of the particular case. These cases are: Powers v. Crane, supra, n. 10; McCallion v. Hibernia Society (1893),

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for the general rule followed in this type of case is Republic Iron & Steel Co. v. Patillo.[17] There the court says:

> "It was necessary, in order that a cause of action might be stated, for the plaintiff to allege this fact and the court to make a finding thereon. It cannot be said that a compliance with the statutory requirement in this regard would prove of no benefit to the sureties, and that, therefore, it may be disregarded. The first answer that might be made to such a contention would be that where street improvement proceedings depend upon statutory provisions as giving authority to make such contracts, persons claiming the benefit of such provisions must make substantial compliance with the requirements thereof. The second answer that may be made is that as to the sureties the filing of the verified claim with the public officer showing that the bounden principal has failed to pay for materials, furnished a means of notice to such sureties and by timely action they may be able to protect themselves, where, without notice, their remedy might be lost."

It must be evident that these two uses of the term "statutory bond" cannot be blended in a single definition. An illustration will make this clear. Section 1183 of the Code of Civil Procedure declares that if a bond, in a sum equal to one-half the price stated in a building contract, and inuring to the benefit of materialmen and laborers, is filed together with the contract before the work under the contract commences, the court may, where it would be equitable to do so, restrict the amount of mechanics' liens recoverable in connection with such contract to the amount of the contract price remaining due from the owner of the property to the contractor. A bond given by a

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98 Cal. 442, 33 Pac. 329; Central Lumber Co. v. Center and Reay v. Butler, supra, n. 6.

The theory upon which these cases are to be supported is that the statute permits a certain form of remedy (judgment on motion) only to plaintiffs who comply strictly with the requirements of the statute. In the cases under type II, on the other hand, the question at issue is not as to the nature of the remedy permitted, but rather the nature of the right created. This right arises not by statutory fiat, but out of contract.

[17] Supra, n. 13. In Mangrum v. Truesdale (1900), 128 Cal. 145, 60 Pac. 775, a bond, inuring to the benefit of laborers and materialmen, was given pursuant to Cal. Code Civ. Proc., § 1203, but was not filed as required by such section. A recovery upon this bond was denied upon the ground that actual delivery of a bond of this character (for the benefit of an undetermined class) was impossible; that the filing required by the statute was a substitute for delivery; that since this bond had not been filed it had not been delivered and was for this reason void. This reasoning, however, does not seem to have been repeated in later cases.

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building contractor and surety pursuant to this section would not be a "statutory bond" in the sense described by the cases of type I. The building contractor is free to contract with the owner of the property, so far as the provisions of the mechanics' lien law are concerned, and no bond of this description is required of him as a condition precedent to entering into such contract. He does not secure the right to contract by executing such bond. If section 1183 were held unconstitutional, a building contractor who had given a bond of this description, would be in no position to urge, in the words of Loop Lumber Co. v. Van Loben Sels,[18] "that the bond was given solely to secure a right on the part of the contractor to proceed with the performance of his contract." But on the other hand, a bond given pursuant to section 1183 is surely to be classified as a "statutory bond" in the sense in which that term is used in the cases of type II, and Hubbard v. Jurian,[19] is authority in point. It was there held, as already noted, that if recovery were to be allowed on a bond given pursuant to section 1183 of the Code of Civil Procedure, it must appear that the requirements of the statute had been fully complied with by the beneficiary of the bond. In other words, "statutory bonds" described by the cases of type II comprise all bonds given pursuant to a statute, whereas the "statutory bonds" described by the cases of type I comprise only bonds given pursuant to a statute which makes the execution of a bond a condition precedent to the acquisition of a privilege.

Whether or not a bond is a common law or "statutory" obligation is a question which has called forth no little judicial discussion, and in more than one case has been a vital issue. For example, suppose that Smith enters into a contract with a certain county to build a court house, and that a certain statute

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[18] Supra, n. 8.

[19] Supra, n. 15. In this case it was held that materialmen, seeking recovery on a bond given pursuant to Cal. Code Civ. Proc., § 1183, must prove that they have filed verified claims of lien pursuant to Cal. Code Civ. Proc., § 1187. Compare this with Hammond Lumber Co. v. Willis (1915), 171 Cal. 565, 153 Pac. 947, which allowed recovery on a bond given pursuant to section 1183 even though such bond had not been filed as provided by section 1187. This may perhaps be distinguished from Hubbard v. Jurian on the ground that the filing of the bond is not a duty imposed on the beneficiary of the bond; that therefore the surety cannot urge that he is entitled to have the bond filed, and that a failure to file the same is an inequitable variation of his risk by an act of the beneficiary; whereas the filing of a verified claim of lien is a duty imposed upon the beneficiaries of such bond, i.e., materialmen and laborers, and therefore a duty the performance of which the surety is entitled to rely upon.

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either (1) requires a bond from the contractor as a condition precedent to entering into this contract or (2) provides that the contractor may give a bond. If the statute is of the former character and for any reason is declared unconstitutional or inapplicable to the case at bar, or if the statute is of either character and the beneficiary of the bond has not complied with the requirements which such statute makes of him, the beneficiary will probably urge that he is nevertheless entitled to recover on the bond as a common law undertaking.[20] Doubtless this question should be answered by determining the intention of the parties, i. e., if the obligors named in the bond intended to comply with the statute it should be declared to be a "statutory bond"; if they did not, it should be held to be a common law obligation. The following excerpts from cases in which this question was

[20] A line of cases following Kiessig v. Allspaugh (1891), 91 Cal. 234, 27 Pac. 662, will usually be cited whenever it is urged that a given instrument is a common law bond. These cases arose upon bonds given to protect a property owner, who had contracted for the erection of a building on his land, against claims on account of material and labor furnished in connection with such contract. At the time these cases were decided, Cal. Code Civ. Proc., § 1183 (Cal. Stats. 1885, p. 143) provided that where the price named in a building contract exceeded $1000, the building contract should be recorded and if not recorded should be "wholly void." In these cases the building contract had not been recorded, and it was urged that since the contracts were therefore void, the bonds, upon which recovery was sought, were also void as having been given to secure the performance of void contracts. The court, however, in each case allowed recovery, pointing out that the covenant in the bonds for the payment of labor and material claims had no connection with the performance or non-performance of the contracts, and was supported by other consideration. As the court in Kiessig v. Allspaugh says, the purpose of the bond "is not to secure to plaintiff reimbursement for any damage, the right to recover which rests alone upon the building contract." It is to be noted that in these cases the bond could not be described as a "statutory bond" of either type, since Cal. Code Civ. Proc., § 1183, did not in terms provide for any bond at all, and hence these bonds could not have been given pursuant to statutory requirement or permission. The cases thus referred to are: Kiessig v. Allspaugh, supra; Blyth v. Robinson (1894), 104 Cal. 239, 37 Pac. 904; McMenomy v. White (1896), 115 Cal. 339, 47 Pac. 109; Summerton v. Hanson (1897), 117 Cal. 252, 49 Pac. 135; Watterson v. Owens River Canal Co. (1914), 25 Cal. App. 247, 143 Pac. 90.

Another familiar line of cases in which the undertaking was declared to be a common law bond are those wherein it is held that although the undertaking is not in the form required by the Code for releasing property from attachment, yet if it is voluntarily given and does in fact procure the release of property from attachment, it is valid. Palmer v. Vance (1859), 13 Cal. 553; Smith v. Fargo (1881), 57 Cal. 157; Gardner v. Donnelly (1890), 86 Cal. 367, 24 Pac. 1072; Bailey v. Aetna Indemnity Co. (1907), 5 Cal. App. 740, 91 Pac. 416; Kanouse v. Brand (1909), 11 Cal. App. 669, 106 Pac. 120.

See also, Baker v. Bartol (1857), 7 Cal. 551; Alaska Improvement Co. v. Hirsch (1897), 119 Cal. 249, 47 Pac. 124.

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squarely presented show what circumstances the courts will rely upon as indicating, doubtless, that the obligors intended that the bond in a given case should comply with the statute:

> "The bond itself makes no express reference to the statute or by any language pretends to discover the source from which it comes, and it is, therefore, manifest that the vital question submitted here must largely be determined upon the wording of the bond or by comparing its language with that of the statute. . . . .
> "Comparing the undertaking with the statue, it will readily be noted that that part of the former which specifies the conditions to be fulfilled by the contractors to render the undertaking inoperative or without effect is in the precise language of the statute. It is also to be observed that the amount of the bond is approximately that prescribed and required by the statute. There is no conceivable substantial difference, in substance and legal effect, between the conditions of the bond and those prescribed by the statute. Moreover, the presumption is that the board of trustees, as a public official body, performed every duty imposed upon it by law, and that, therefore, it exacted from the contractors the bond required by the statute in such cases. . . . .
> "It is obviously not necessary that the bond should expressly refer to the statute in order to constitute it a *statutory bond*. A bond, though not in the words of the statute requiring it to be given, if its substance and legal effect is the same as the form prescribed by such statute, is a statutory bond. . . . ."[21]
> "While the bond does not expressly declare that it is given pursuant to said section, the facts in the case clearly show that it was. It is alleged in the complaint (all the allegations of which in the agreed case are found to be true) that this bond 'by the provisions of section 1203 of the Code of Civil Procedure . . . . was made to inure to the benefit of all persons . . . . furnishing materials to be used in the construction of said building.' It is conditioned in a penalty of twenty-four hundred dollars, which appears to be twenty-five per cent of the contract price, as the said section requires. The general clause in the bond under which appellant claims,—to wit, 'This bond and undertaking shall inure,' etc., is a bodily excerpt from said section. The bond was filed with, and at the same time, the building contract was filed, as the section provides it must be, and the briefs of appellant discuss, and uphold it, as a bond given under such section, while at the same time claiming that if

[21] Miles v. Baley, supra n. 10.

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not available as a statutory bond, it is nevertheless good as a common-law obligation. . . . ."[22]

"The bond, as to its terms and conditions, was precisely the undertaking contemplated by section 1203 of the Code of Civil Procedure. It referred to the builder's contract; was for an amount 'equal to at least twenty-five per cent of the contract price hereinafter referred to'; by its terms it was made to inure to the benefit of any and all persons who might perform labor or furnish materials to the contractor, and was to remain in full force and effect if the contractor did not fully pay to any and all persons the value of the labor or materials furnished by them, or any of them. It is clearly, then, the undertaking called for by section 1203. . . . ."[23]

"While it was not alleged in the complaint, nor made the subject of any finding by the court, that the bond was given under the authority of statute, considering that the municipality was only authorized to act under permission of statutory authority in making the street improvement, and further, that the bond in its terms was phrased according to the statutory requirement, it must be assumed that the contract was so made and the bond given in connection therewith accordingly."[24]

An examination of all the circumstances of each case in this way is unnecessary where the bond itself recites that it is given to comply with a certain statute. Such recital seems to be regarded as at least *prima facie* evidence that the bond is "statutory" and not a common law obligation.[25]

An interesting question, which may arise in connection with the cases of type I, is whether or not recitals may be inserted in the bond which will estop the surety from setting up the

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[22] San Francisco Lumber Co. v. Bibb, supra, n. 4.

[23] Mangrum v. Truesdale, supra, n. 17.

[24] Republic Iron & Steel Co. v. Patillo, supra, n. 13. See also Martin v. McCabe, supra, n. 4. In this case the bond recited that it should be "construed as a common-law bond in favor of said W. A. Bean and L. O. Stephens." Bean and Stephens were property owners and the bond was conditioned for the payment of material and labor claims against their property in connection with a certain building contract. It was held that this was a bond given pursuant to Cal. Code Civ. Proc., § 1203. In the opinion it is said: "In accordance with a familiar rule of interpretation, the recital as to the undertaking being construed as a common law bond in favor of said W. A. Bean and L. O. Stephens, the owners of the building, who are not parties to this action, is also a circumstance confirmatory of the position that as to the other parties the instrument was intended to be a statutory bond."

[25] San Francisco Lumber Co. v. Bibb, supra, n. 4; Shaughnessy v. American Surety Co., supra, n. 1; Martin v. McCabe, supra, n. 4; Loop Lumber Co. v. Van Loben Sels, supra, n. 8.

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defense that the statute requiring the bond does not apply to the particular facts presented, and that the bond is therefore unnecessary, without consideration, and void. In other words, suppose that in a case similar to Loop Lumber Co. v. Van Loben Sels,[26] the bond contained a recital that the Bond Act was binding upon the contracting parties, could the surety on such bond plead that the Bond Act did not govern the proceeding? In Live Oak Lumber Co. v. Farr,[27] reliance upon a recital of a legal conclusion appears to have furnished the basis for an estoppel. The court says:

> "There is no merit in the contention that by specific averment it should appear that the city was authorized to order the work done. The contract of suretyship upon which the action was brought contains this provision: 'The condition of the above obligation is such that, whereas, the board of trustees of the city of Gridley, a municipal corporation of the sixth class, of the county of Butte, state of California, has heretofore awarded a contract to the above-named principal to do and perform the following work in said city of Gridley: . . . . Now, therefore, if the above bounden William F. Farr fails to pay for any material or supplies furnished for the said work contracted to be done, or for any work or labor thereon of any kind, the sureties on this bond will pay the same.' Having recited in their understanding the execution of said contract, and, upon the strength of said recital, having induced materialmen to deliver material to be used under said contract, the sureties are estopped from saying that the contract was invalid."[28]

On the other hand, in Estate of Kennedy,[29] which held that a stay bond given upon an appeal from a decree of distribution was unnecessary and therefore without consideration and void, the court says:

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[26] Supra, n. 8.

[27] (1915), 28 Cal. App. 641, 153 Pac. 741.

[28] Accord: McMillan v. Dana (1861), 18 Cal. 339; Smith v. Fargo, supra, n. 20; Pierce v. Whiting (1883), 63 Cal. 538; Bailey v. Aetna Indemnity Co., supra, n. 20; Hammond v. U. S. Fidelity & Guaranty Co. (1916), 29 Cal. App. 464, 468, 155 Pac. 1023.

In People v. Jenkins (1861), 17 Cal. 500; People v. Hudson (1889), 78 Cal. 154; 20 Pac. 369; and Moore v. Earl (1891), 91 Cal. 632, 27 Pac. 1087, the surety was held estopped by recitals in the bond of a public official to deny the lawful appointment of such official.

In Kiessig v. Allspaugh, supra, n. 20, it was said: ". . . . if, in order to support this action, it is necessary that the bond should be based upon a valid building contract, we should hold that the appellant is estopped to dispute the truth of the particular recital contained in the bond as to such fact."

[29] (1900), 129 Cal. 384, 62 Pac. 64.

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> "When want of consideration is pleaded there is no estoppel, whatever the terms of the instrument may be, which can interfere with that defense. The idea of such estoppel comes down to us from the days of sealed instruments. Seals were abolished by the code (Civ. Code, sec. 1629), and that there is a good and sufficient consideration for an instrument in writing is expressly made a disputable presumption which may be controverted by other evidence. (Code Civ. Proc. sec. 1963.)"

And in Alaska Improvement Co. v. Hirsch,[80] where a bond, given by a plaintiff supposedly to secure the continuance of a temporary restraining order, was held void on the ground that it did not appear that the restraining order was continued in force by reason of such bond, the court says:

> "Here, the giving of a bond was not made to effect the continuance of a restraint, therefore the continuance of the restraint could not have been a consideration for the bond, *even though it had been so recited in the bond.*"

The foregoing classification, though doubtless imperfect in some details, will at least have shown the danger of reasoning: (1) that a given instrument complies with certain objective standards; (2) that because it complies with such standards it it a "statutory bond"; (3) that because it is a "statutory bond" certain results may inevitably be taken for granted. Whether or not an undertaking is a "statutory bond" of either type must depend upon the intention of the parties, such intention being determined from an examination of the circumstances of each case—at best a method of classification which defies exact definition. Having decided that a given instrument is a "statutory bond", because it was the intention of the parties that it should comply with the provisions of a given statute, its validity will often depend upon whether or not the statute requires the bond to be executed as a condition precedent to the acquisition of some privilege. Finally, wherever a bond is given to comply with a statute, the performance which the statute requires of the beneficiary of the bond must be proved before such beneficiary will be allowed to recover. This requires in every case a careful examination of the statute.

John M. Hall.

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[80] (1897), 119 Cal. 249, 47 Pac. 124, 51 Pac. 340.

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The War and Political Theory

III. Nationality and Nationalism.*

THE growing importance of the problem of nationality, a problem so long passed over in silence or just touched upon in the leading textbooks of political theory, serves as one more inducement to revise our traditional method. For undoubtedly it has become necessary for the statesmen of the world to apply new categories, or rather to stress things hitherto little thought of in international relations. From the beginning of the war the problem of nationality has been coming more and more into the foreground. Early in August, 1914, the French Government proclaimed that it is making a distinction between the Germans and the Hungarians on the one hand, and between the subject nationalities of Germany and Austria-Hungary on the other hand. The British Government has repeatedly declared that it is fighting for the freedom of nationalities:

> ". . . . We shall never sheathe the sword which we have not lightly drawn until Belgium recovers in full measure all and more than all that she has sacrificed, until France is adequately secured against the menace of aggression, until the rights of the smaller nationalities of Europe are placed upon an unassailable foundation. . . . ."

This was the declaration of Mr. Asquith in his famous Guildhall speech on November 9, 1914.[1]

The same principle of nationality was emphasized, nearly two years later, by Sir Edward Grey:

> "What we and our allies are fighting for is a free Europe. We want a Europe free, not only from the domination of one nationality by another. . . . ."[2]

And the principle of nationality, adhered to also by Italy, was finally formulated by the President of the United States both before and after the United States had found herself at war. In his address to the Senate on January 22, 1917, the President said:

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*See September issue of this Review.

[1] The Times (London), November 10, 1914, p. 10, col. 5.

[2] War Supplement, History Teacher's Magazine, January, 1918, p. 47.

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> ". . . . I am proposing, as it were . . . . that no nation should seek to extend its polity over any other nation or people, but that every people should be left free to determine its own polity, its own way of development, undhindered, unthreatened, unafraid, the little along with the great and powerful. . . . ."[3]

The President reiterated the principle of nationality as one of the things for the recognition of which the United States was entering the war.

> ". . . . we are glad . . . . to fight . . . . for the rights of nations great and small and the privilege of men everywhere to choose their way of life and of obedience. . . . ."[4]

And a few days ago, in defining America's war aims, he again specified:

> ". . . . that all well-defined national aspirations shall be accorded the utmost satisfaction that can be accorded them without introducing new or perpetuating old elements of discord and antagonism that would be likely in time to break the peace of Europe and consequently of the world. . . . ."[5]

This recognition of the truth and value of the principle of nationality is all the more edifying since it is not only the writers on political theory that have refused recognition to an obvious fact. We have been told by historians of all the evils entailed by nationality.

> "By its fatal entanglement with discordant nationalist ambitions, the democratic-nationalist revolution" (of 1848) "was doomed to destroy itself in a conflict of nations . . . ."[6]
> ". . . . a sense of nationality could fatally choke an aspiration for democratic government. . . . ."[7]

To make things worse, there has been a good deal of confusion as to just what is meant by nationality. What I should call nationality is confused with something different which may best be termed nationalism; and there is in the minds of even some of the honest and whole-hearted supporters of Allied policy by no

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[3] New York Times, Jan. 23, 1917, p. 1, col. 6.
[4] The President's address to Congress April 2, 1917, New York Times, April 3, 1917, p. 1, col. 5.
[5] The President's address to Congress February 11, 1918, New York Times, February 12, 1918, p. 1, col. 6.
[6] Hayes, A Political and Social History of Modern Europe, Vol. II, 133.
[7] Id., 149.

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means a clear conception as to how the principle of nationality will square with the aims of the world peace and world organization. It is to these subjects that the present discussion will be devoted.

It may be well to start by speaking of nationality. As the word is commonly used in this country, and even in England—a usage violently opposed by the scholars belonging to the oppressed nationalities, such as Poles, Bohemians (Czechs), and Yugoslavs —it may simply mean the legal aspect of nationality, that is, the fact that one is the citizen or the subject of a given country or ruler, for instance, that one is a British subject, or an American citizen, or "belongs" to the German Empire.[8] As distinguished from this legal sense, nationality in the psychological sense is the nationality of the Poles, the Czechoslovaks, the Yugoslavs, the Italians of Italia Irredenta, that is, those who as the people of Trieste or the Trentino are legally the subjects of that same Austria they want to see destroyed.

What is the criterion of this psychological nationality? It is not necessarily the fact that one belongs to a given state. Undoubtedly the foundation of American and Swiss nationality is the fact that one is an American or a Swiss citizen, but the majority of Austrian citizens would distinctly deny that theirs is the "Austrian" nationality and would give as their nationality Bohemian, or Polish, or Rumanian, and so forth.[9] The same would be true of the Poles who are subjects of Prussia, the Alsatians and Lorrainers, the Danes of Slesvig, with regard to a question whether they are of German nationality. And, again, the same attitude would be taken by the Poles who are subjects of Russia.

Is, then, nationality based on race? By no means. First of all, we are told that there is no such thing as a pure race. It would indeed be difficult to disentangle on the basis of race the

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[8] E. g., Hall, International Law, 7 ed. (1917), 233 ff.; cf. id. 122, note 1.

[9] The "fundamental statute of December 21, 1867, on the general rights of the citizens of the kingdoms and countries represented in the Reichsrat," still in force, declares in Art. 1 that "for all those belonging to the kingdoms and countries represented in the Reichsrat there exists a general Austrian citizenship" (this is one of the very few cases in which the word "Austrian" is used in such a statute); Art. 19 proclaims that "all the racial groups (Volksstämme) of this state have equal rights and each racial group has an inviolable right to preserve and develop its nationality and language" (Bernatzik, Die Oesterreichischen Verfassungsgesetze, 2 ed., 1911, pp. 422, 426).

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problem of nationality in Central Europe where the most patriotic Poles and Bohemians will sometimes have German names, while among the important leaders of Germany will be found men with Slav, French, or Italian names. And what is the English race?[10] What is the scientific criterion of race to be used in distinguishing Englishmen from Americans, Welshmen from Irishmen, even men supposedly English from those who are said to be Scotch or Welsh? What, again, will be the racial distinction between Poles and Bohemians?

Shall we say that religion is a criterion? Religion has indeed been used by the Hapsburgs to distinguish between the Serbs and the Croats, the former Orthodox, the latter Catholic, but both speaking the same language, though the difference of religion has brought with it the use of the Cyrillic (Slavonic, similar to the Russian) alphabet for the Serb and the Latin for the Croat.[11] Are there not both Catholic and Protestant Germans? And what of the religions in the United States? In Switzerland? In Holland? In England?

Neither can it be said that common territory is the foundation of a common nationality. The so-called nationally mixed districts, such as parts of the Balkans, certain districts of Bohemia, and of other countries show the true conditions to be different. There is a strongly realized bond of union between the Poles born in Prussian or Russian or Austrian Poland and between the Poles who have been forced to emigrate to Westphalia (including their children), whereas there is a feeling of national difference between the Poles and the few Russians in Russian, or the Germans in Prussian Poland, or Westphalia. But then, again, language itself is by no means an indication of a common nationality, as witness the English and the Americans, the French and the French-Swiss who speak the same language respectively, on one hand, the French-Swiss and the Italian-Swiss, the Walloons and the Flemings (so unsuccessfully claimed by the Germans in Belgium) on the other hand.

At the basis of nationality there need not even be common

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[10] Quiller-Couch, The Art of Writing, ch. VIII, IX.

[11] Among the most insidious designs is the election of the members of the diet of Bosnia-Herzegovina, under the constitution imposed by the Hapsburg Francis Joseph in 1910, by electoral colleges divided on the basis of religion (they are Catholic, Mohammedan, or Orthodox). See the ordinance relating to elections, of February 17, 1910, section 5, Bernatzik, Die Oesterreichischen Verfassungsgesetze, 2 ed. (1911), 1051.

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traditions. The aristocracy of Poland and Russia would in many cases have traditions more in common with the aristocracy of France or England than with the Polish or Russian peasants, and, similarly, a common literature is not the essential bond of union, because in many cases the uneducated classes do not know the literature of their nation and educated men enjoy the literature of countries other than their own almost or quite as much as theirs.

There is, then, no one external criterion which could suffice in all cases. The real criterion is purely psychological, that is, the individual is conscious of belonging to this, that, or the other group. This psychological criterion was formulated first, I believe, in the early fifties by Mancini (the Italians having led the democratic and national regeneration of Continental Europe in the nineteenth century in so many ways).[12] From the nature of this criterion it follows that the limitations on the feeling of nationality depend on the importance which in the consciousness of the individual attaches to one or the other element which he has in common with others. He may, for instance, consider his religion more important than other elements of his make-up and feel more closely united by religious bonds with men of the same faith though of a different nationality than with men speaking the same language, descended from the same stock, brought up amid the same national traditions, but professing a different faith. His class interests, or simply his economic condition, may seem to him more important than national ideals, and he may feel a member of the international, or better, unnational fighting proletariat or high finance rather than make sacrifices for his nationality. Similarly, one may attach most importance to family and traditions in the sense that while one would consider it no shame to marry a foreigner of equally "good" blood there would be ignominy in marrying one's countryman or countrywoman of humbler birth.[13]

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[12] The same idea is adhered to in that splendid book on "The Problem of National Policy" (Zagadnienie narodowej polityki) by my dearly beloved teacher, Professor Józef Milewski, who died in exile during the present war, the staunchest exponent of the idea that Poland's independence could be brought about only through an absolute defeat of Germany and Austria, and, therefore, through an Allied victory.

[13] This rule prevails among most of the European dynasties; in the majority of cases the marriage with a person not belonging to a family which rules or has once ruled results in a degradation of the issue of the marriage, and sometimes even of the prince or princess who enters into such

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The explanation of this psychological phenomenon of nationality is not difficult. One of its component elements is undoubtedly the feeling of solidarity with those by whom we have been surrounded from the first. Yet this element should be properly understood. There will naturally be a feeling of solidarity with a foreign-born fellow-national rather than with an alien bred in the same country. This is particularly true where legal nationality does not coincide with psychological nationality, for instance, in the case of Poland or Bohemia. Indeed, the German born and bred in Bohemia is to the Bohemian (Czech) the very enemy of enemies. The feeling of solidarity as a foundation of nationality finds additional emphasis in the natural attachment one has for the country of one's origin, for one's language, one's customs, the traditions which have been instilled into one since one's youth. Here nationality is only one instance of an ever-recurring experience,—we think fondly of the house we have known since our childhood, the street, the city or village. In the United States there is similarly that attachment to one's original state as against any other state in the Union, and yet that does not prevent one's attachment to the whole country.[14] Solidarity is so much the natural trait of mankind, that we often feel ourselves more at one with those travelling in the same compartment of a street car than with those in the next compartment; we speak or "our car" and "your car." Similarly, there may be a sense of half-jocular and half-serious antagonism between the inhabitants of different streets or different parts of a city, a country, or a state.

Another characteristic feature of the psychological phenomenon of nationality is that given certain conditions it is all the stronger in the face of oppression. There is a trait of proud chivalry in the human mind, an inclination to sacrifice oneself for an ideal. This is another result of the instinct of solidarity. We stand by other men in the name of solidarity, chivalry toward women is in most cases subconsciously derived from a care for the good of

an "unequal" marriage. The existence of numerous dynasties in Germany (twenty-two of whose twenty-five states are monarchies, while many other families, though "mediatized" now, did rule over territories in years gone by) accounts for the fact that there are only some two or three ruling houses in Europe which are not either of German descent or related to German ruling houses.

[14] The admirable habit of cities, counties, and states within the Union, of vying with one another in subscribing to the Liberty Loans, is a fine example of a wholesome "local patriotism."

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the race, and we consider our own suffering less important than any harm to the cause of the ideals which we have cherished in common with others. Hence, nationality is essentially a non-economic feeling, in many cases the victims of nationalistic persecutions could enjoy much more material prosperity if they submitted to their oppressors. This is true, for instance, of the Poles in Prussia and in Russia. Similarly, the heroic resistance of the Belgian people to the German invasion, and then the resistance of every individual to frightfulness has been a fact in spite of the inducements offered to individuals who would betray the cause of Belgium and with it that of civilization. The feeling of nationality has at its foundation no selfishness, while even religion is based on a hope of reward here or in the Great Beyond, or on the fear of damnation or other punishment. Nationality is not even group selfishness, as has been thought. The great struggles for national liberty in the eighteenth and nineteenth centuries were fought by people who struggled "for our liberty and yours" and who again and again emphasized the common cause of human liberty (Kosciuszko, Pulaski, Mazzini, and others).

The psychological explanation of nationality will make it clear that in the case of each individual the attachment to his nationality (whatever its foundation) will be stronger or weaker according to the history, the character, the experience, the training of the individual. A man who has travelled much will attach less importance to small points which will seem paramount to a provincial or insular person. From a man who has come into contact with different groups of men and who has seen different countries we expect what is called a "broader view"; and we speak approvingly of endeavors to give the little ones what we call education in a broad and generous spirit.

And it is also clear from the psychological character of nationality that it has been neither a nineteenth century growth nor a principle "believed in" in the nineteenth century more fervently than at other times. Its basis is certain natural traits of the human character, and human character did not originate in the nineteenth century. It is enough (without mentioning antiquity) to survey the history of the Middle Ages to remember how in England, nationality, the attachment to the English language, and to English institutions, were manifest; how at the same time

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the movement led by Joan of Arc in France was a national one (the English and the French were equally Catholics). Again, in Poland the struggles against the Teutonic Knights were essentially struggles for the preservation of Polish nationality against German aggression;[15] in Bohemia at the very same time Jan Huss was the leader of the Bohemian national movement as much as he was a religious reformer;[16] and early in the fifteenth century German professors and students left the University of Prague because of its national character.[17] It is true that, particularly in Germany, the feeling of a common nationality had been largely dimmed by the existence of innumerable small "sovereignties," so that the German princes could for instance combine with foreign princes (the rulers of France or Sweden) against other German princes, and the princes were blindly followed by their peoples. But it would be an injustice to mankind to blame it for the German lack of political genius. Similarly, ever since the destruction of the old Roman Empire, Italy had been split into a number of political units of various sizes, due mainly to foreign, primarily German, intrigue. But here again it would seem wrong to assume that it was not until the nineteenth century that Italian national feeling was developed. For what happened in the nineteenth century was simply that broader masses of the population were admitted in all countries to government.[18] Hence the dynastic interests had to give way more and more to the wishes of the nations. And there is no doubt that the attempts to discredit nationality have been due directly or indirectly to a desire to avoid the destruction of such unnatural political units as Austria-Hungary (a creation of the Hapsburg dynasty kept in subjection against the will of the different nation-

[15] The Teutonic Knights (sometimes called the Knights of the Cross; their black cross in a white field is still reproduced on the German flying machines), the ancestors of modern Prussia, extolled so highly by modern German leaders (Treitschke, Historische und politische Aufsätze, II, 3 ff.) conducted their wars against Poland on a basis of extermination. One of the complaints against them to the Pope charges them with having behaved during the war of 1431 in such a way as if they were trying to "exterminate (those who were speaking) the Polish language" (quod lingwagium Polonicale exterminari deberet), Lewicki, Codex Epistolaris saeculi XV, II. 303 (October, 1432).

[16] Lützow, Bohemia, 93-96, 98.

[17] Id., 98.

[18] Where, as in England, a greater measure of popular government existed before, the national feeling was a more important factor in politics.

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alities), or to avoid the taking away from Germany of those territories (Alsace-Lorraine, Danish Slesvig, Prussian Poland) which are kept by Germany in direct violation of the principle of nationality. There has, in other words, always been, and there must be, a connection between democracy and nationality. The recognition of democracy entails the recognition that everybody can choose his own nationality and help develop it.[19]

But nationality is not nationalism (sometimes called chauvinism). Nationalism (chauvinism) is a distortion of nationality just as bigotry is a distortion of religion, and just as covetousness and miserliness are distortions of thrift. There are men who take advantage, for their selfish purposes, of the devotion to nationality just as impostors can and will take advantage of charity. In the case of the individual, the man in the street, nationalism may be a spirit of exclusiveness (the Chinese wall; all primitive dislike of strangers except in places where there is need of hands or brains, that is, in newly colonized territories with many opportunities and much need of human cooperation). Such exclusiveness may be perfectly peaceful, it may be just a desire to keep away from outsiders, or it may be that characteristic German pacifism so well described by the Roman historian: "they make a desert round their districts and they call it peace." The exclusiveness is usually accompanied by a feeling of superiority and a more or less strong contempt for all the others. This results from the often natural dislike of the unknown, even a fear of the unknown not exclusively peculiar to men (the dog is a very interesting example). And, finally, nationalism in the case of the individual may amount to a desire of conquest "for the nation," of subduing other peoples, getting commercial opportunities for each individual, imposing one's civilization, or preferably one's Kultur, on others: it is not a case of wishing to contribute to the common civilization of mankind, but of compelling others to accept what one considers best.[20]

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[19] The recognition must of course not only exist on the paper, as in the "Austrian" statute of 1867, supra, n. 9.

[20] No more eloquent indictment of German nationalism could be found than that contained in the answer to Theodore Mommsen's battle cry for the Germans of Austria against the Slavs, by Professor Oswald Balzer of the University of Lwów: ". . . To a great part of the German peoples, the interests of culture have always been associated with the State interest, i. e., the State interest has been in the first place. They carried civilization to the Slavonic East to gain for themselves political advantages, and they

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Nationalism is the case of the leaders and agitators may indeed have economic motives. It may be founded on a desire to secure better positions,[21] to promote one's newspaper by appealing to the masses, it may be based on a wish for more territory as industrial hinterland (Bosnia and the rest of the Balkans as Austrian aim), or for economic investments or possessions (German-owned coal mines in Silesia and German landlords in the Russian Baltic provices); nationalism in economics may particularly appeal for economic barriers (tariff walls) so as to promote the industrial exploitation of the inhabitants of the given territory. But apart from the economic motive, the leaders may be actuated by a political motive, the desire to call attention to a need of defense in order to divert attention from internal conditions, or even in order to maintain and increase a strong fighting machine (Prussian militarism).

Thus nationality, on one hand, is essentially human. If "human society is intended to facilitate co-operation and lead to everybody's happiness with everybody's help," if "this is the recognized aim of democracy," then a recognition of nationality is essentially democratic.

On the other hand, nationalism is, with the honest individual, forgetfulness or a degeneration of social solidarity; in the case of the leaders it is taking advantage of individuals in the interest of an economic or political autocracy or aristocracy.

The present war has lasted long enough to make the individualistic method in political science come to the fore again. And all the time, in spite of each and every theory that has made us

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did not hesitate to give up the cause of culture wherever their own egoistic political interests required some sacrifice. Politicians and Germanizers, in a higher degree than civilizers, they perpetually identified the idea of culture with the idea of their own State and their own nationality; they believed and wished to persuade the world—they even wanted the world to believe them—that the way to civilization leads only through Germany, and that there can be no better fortune for other peoples than to attain by that way to greater perfection. . . ." These words of Prof. Balzer were written and published in 1897. They thrilled the Slav world, but who in the west of Europe or in America has known of them? And yet the present war is another illustration of the same truth. Cf. Poland, Prussia, and Culture, Oxford Pamphlets, 1914, no. 37, p. 26.

[21] The Prussian East March Association (Ostmarkenverein), a society the object of which is to promote the Germanization of Poland, secures good positions and much influence for those whom it uses to carry out its abominable work. The Prussian state officials in the Polish provinces receive a special bonus if they behave in a way satisfactory to the Government—it is easy to imagine what is meant by this condition.

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forget the problem of nationalities, the human element, the importance of nationality, will come out. That is why President Wilson referred long ago to the necessity of a "united, independent, and autonomous Poland,"[22] That is why the Czechoslovaks,[23] and the Poles,[24] and the Rumanians, and the Yugoslavs,[25] and the Greeks, and all those others have been again and again in the foreground of war discussions. Something must have been wrong with the old political system. And that is why, as President Wilson declares,

> ". . . . all well-defined national aspirations shall be accorded the utmost satisfaction that can be accorded them without introducing new or perpetuating old elements of discord and antagonism. . . ."[26]

There will have to come a reconstruction of Europe on national lines, that is, legal nationality will be made to square as much as possible with psychological nationality. Yet we must recognize that there is no such thing as a perpetual arrangement of political organization. The latter depends entirely on the developments in human psychology, and hence, seeing that every organization is a set of ideas, a change in the ideas of men composing the different groups will produce a change in the organization. There is now, and there will be more and more of, a tendency to a better mutual understanding and friendship between the different groups. Nationality is based on a number of human instincts common to mankind. But for this same reason the extent and intensity of the national feeling may vary according to the education and the inclinations of the individual. This is where a common basis for a much better mutual understanding can be worked out. And we realize that this better understanding will result in some common organization.[27]

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[22] The President's address to the Senate, January 22, 1917, New York Times, January 23, 1917, p. 1, col. 6.

[23] They have now been recognized as an allied nation by the United States.

[24] On October 16, 1918, the British Government, according to an official announcement, declared that it had "recognized the Polish national army as autonomous, allied, and co-belligerent."

[25] See the declaration of Corfu in Butler's introduction to Savic, Southeastern Europe. The United States Government has proclaimed its recognition of the Yugoslav aims.

[26] The President's address of February 11, 1918, New York Times, February 12, 1918, p. 1, col. 6.

[27] The elimination of German propaganda will be a great step in that direction. It will dispel the general ignorance of the different countries

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> ". . . . and then the free peoples of the world must draw together in some common covenant, some genuine and practical co-operation that will in effect combine their force to secure peace and justice in the dealings of nations with one another . . . . The nations must realize their common life and effect a workable partnership to secure that life against the aggressions of autocratic and self-pleasing power. . . ."[28]

And that means, that the war will also result in something that will lessen the danger of nationalism. The international organization should first of all prevent struggles between local organizations, and where such struggles be inevitable, it should make them less acute, it should make possible their peaceful adjustment; it should subject such adjustment to strict rules, just as now the conflicts between the states in the Union, or between cities or corporations, are adjusted by litigation where formerly they would have resulted in bloody wars. That common organization should make arrangements above all for the peaceful adjustment of national disputes in those nationally mixed districts the existence of which with the best will in the world it will be impossible to avoid. For such districts there should be laid down rules guaranteeing certain rights to the members of the national minorities, and entitling each individual member of a national minority to complain directly before the central common court against his own government in cases of infringment of such rights. In other words, it would be the individual and not the group as represented by its government, that would enjoy protection before the international court.

Thus the war may result in a closer union, not of nations as abstract "states," but of the individuals of different nationalities. Their union will be closer, hence nationalism will be less likely to develop. The union will be closer legally, and hence there will be less possibility of an unwarranted aggression. The union will be closer politically, psychologically, hence men in different countries will take more interest in one another, the schools will or should give the children a broader point of view, and there will or should be less chance for narrow-mindedness.

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of Europe, it will show that their problems are not as complicated as might appear at first. It will make the teaching of history broader and truer, and the east of Europe will no more be looked at "through German eyes."

[28] The President's message to Russia, New York Times, June 10, 1917, p. 1, col. 6.

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The individual still remains the basis of our investigation. His national feelings will be respected. But his associations will be wider. His patriotism will not interfere with his feelings for humanity just as his local patriotism does not now interfere with his love of his country.

IV. Internationalism.

Our observations so far have resulted in the statements that, negatively speaking, the present theory of the state and of sovereignty does not explain the actual phenomena of life and is, therefore, unnecessary. Furthermore it is not useful, but harmful, because it attributes supremacy to the so-called will of the state, which means a man or a group of men claiming to act on behalf of the abstract state. Positively speaking, we have assumed that all explanation of the phenomena of political life must start with the individual, that our study is in fact a study of applied psychology, that we aim at discovering fundamental rules governing the conduct of individuals. Having observed the social instinct, one result of which is the feeling of solidarity, we try to establish the degrees of the latter in different circumstances of human life. We have assumed that all human society is intended to facilitate human co-operation and to lead to everybody's happiness with everybody's help; and we maintain that all progress consists in making conflicts, not only between individuals, but also between groups, less acute, and if possible preventing them, otherwise adjusting them. We have tried to show that nationality as a feeling of individuals will have to be the basis of reconstruction, but that steps will have to be taken to prevent nationalism and to make possible a peaceful co-operation of individuals forming different groups. We must try to find, then, whether there exist already ties of solidarity between men now belonging to different groups, and if so in what way such ties can be strengthened. In other words, we must see in how far we can help the social instinct positively by widening the scope of co-operation between men, and negatively by preventing, adjusting, or smoothing conflicts between men and groups of men.

And there certainly does exist a demand for some decisive steps. Let us listen again to the words of President Wilson:

> ". . . . and then the free peoples of the world must draw together in some common covenant, some genuine and prac-

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> tical co-operation that will in effect combine their force to secure peace and justice in the dealings of nations with one another . . . . The nations must realize their common life and effect a workable partnership to secure that life against the aggressions of autocratic and self-pleasing power. . . ."[29]

We must find, then, what psychological internationalism consists in today, how it can be furthered, what form of international organization (legal internationalism) there is, and what form of it must or should come.

There is a positive and a negative side of psychological internationalism. Positively speaking, it is a realization and a tendency. Consciously or otherwise, we act on the assumption that men outside our own group are men nevertheless. We adopt their ideas (imitation), and the more so, the closer our conditions resemble theirs, the fewer differences, the more similarities there are between them. Hence people who speak foreign languages can get along easier with foreigners, people with education understand other people's ideas as embodied in their social life and expressed in their literature. Hence, also, the closer the intercourse between two groups the more will they influence one another, because their ideas are being exchanged and their conditions of life are becoming similar. Hence, also, as civilization advances, the ideas which further our common aim best are imitated more readily and more easily. And if we want to notice the similarities rather than emphasize the differences, we shall be struck by the great number of common institutions. If we think of the common ideas underlying in different countries the organization of railroads, shipping, schools, police forces, and so on, and if we notice how far distant provinces of the same "state" differ from one another, but resemble the neighboring parts of other "states;"[30] if we realize the common interest of civilized mankind in masterpieces of art, in literature, in learning, then indeed shall we be able to understand that those common ideas in organization and those common masterpieces do belong already to more than one group, that they belong to all civilized men. And the realization of this is one phase of psychological internationalism. But psychological internationalism

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[29] Id.

[30] Compare the relations between Canada on the one hand, and the United States and England on the other hand.

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on its positive side consists also in a tendency. It is the tendency to make possible the co-operation of wider and wider groups, to facilitate an interchange of ideas, to bring about such common standards of behavior as will make conflicts less acute and will enhance a co-ordination of the efforts to ensure common human happiness.

As a result of this tendency it has been necessary to give it a legal expression by concluding international agreements as to copyright, patents, railroad traffic, the postal service. A result of the same tendency is observed in the international congresses of learned men and in the international associations of workmen or business men, in the mutual influence of the stock exchanges in different countries, in the fact that commercial or industrial concerns establish branches in different countries.

And it is as a result of this tendency that the migration of students and teachers from the universities in one state to those in other states is being encouraged, and has been encouraged since learning began to attract men. Those ancient Greeks who visited foreign countries in order to learn, those mediaeval scholars who wandered to different universities, those students who go to far-off countries in quest of knowledge and of a new point of view were, just as the modern students going abroad are, the means of bringing about a better understanding of foreign ideas. Today, in view of the advance the world has made in the meantime, that migration of both teachers and students should be, and is being, encouraged more and more.

There is, however, also a negative side to psychological internationalism. It consists in a recognition that once international solidarity, the solidarity of mankind, is accepted as a basis, everything that tends to weaken it must be defeated. Hence those who try to subjugate or even disturb other groups in the name or for the benefit of a dynasty, a group, or even a combination of groups, must be fought against or else that solidarity will not be realized.

This is what probably will be the fate of the German people:

> "The worst that can happen to the detriment of the German people is this, that if they should still, after the war is over, continue to be obliged to live under ambitious and intriguing masters interested to disturb the peace of the world, men or classes of men whom the other peoples of the world could not trust, it might be impossible to admit them

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> to the partnership of nations which must henceforth guarantee the world's peace. That partnership must be a partnership of peoples, not a mere partnership of governments. It might be impossible, also, in such untoward circumstances, to admit Germany to the free economic intercourse which must inevitably spring out of the other partnerships of a real peace. . . . ."[31]

Similarly, those who directly help such enemies of the solidarity of nations or who refuse to help against[32] them, lose all right to help from others, such as would ordinarily be the effect of human solidarity. For to help them would be to waste efforts which should be used for promoting the solidarity of mankind.

Negatively speaking, psychological internationalism also consists in not allowing antiquated conceptions, legal phrases which have outgrown their usefulness, such as "sovereignty," to prevent us from devising new legal forms which would express and promote international co-operation. We must realize that there is in international relations that same evolution that President Wilson has told us has come about in the national life of this country:

> ". . . . as our life has unfolded and accumulated, ... the whole nature of our political questions has been altered. They have ceased to be legal questions. They have more and more become social questions, questions with regard to the relations of human beings to one another, not merely their legal relations but their moral and spiritiual relations to one another. . . ."[33]

And such legal questions are the questions of sovereignty, of state rights, and the other questions which have made possible the cutting up of the world into a number of states some of which, like Austria-Hungary, Germany, and old Russia, are just so many prisons.

Psychological internationalism, then, takes men everywhere for the basis of their relations with one another. Men form groups; but no one group, whether it be a dynasty, or a class, or a nation, e. g., Germany, or a religious community, (e. g., the Moslems) may be allowed to claim special rights for all its members.[34]

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[31] The President's address to Congress, December 4, 1917, New York Times, December 5, 1917, p. 1, col. 4.

[32] Pro-Germans, apologists for Germany and her crimes, etc.

[33] The President's address before the National Suffrage Association, Sept. 8, 1916, New York Times, September 9, 1916, p 2, col. 5.

[34] In laying down the principles of a League of Nations the President

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This does not mean that individual men may not in life prove in this, or that, or the other, respect, the superiors of others. It does not mean that ideas evolved in one group, whether political ideas, or literature, or science, may not prove more valuable to mankind than a set of ideas evolved in another group. But no group may from the outset be logically allowed to claim the leadership or superiority in the community of nations. Any internationalism which would allow such *a priori* leadership would be a mere pretence. Such a pretence was Marx's appeal to the proletarians of all countries to unite, because from the very Communistic Manifesto in which it appeared it was clear that Germany was to be the leader—a fact which explains the pro-German leanings of the so-called international social democrats—and within that same Germany, as we now know, it was not even monarchy as such that the Marxian school wanted to fight against, but only absolute monarchy.[35] In other words, a pretended constitutional monarchy in Germany would be looked up to as the leader of the world. The results and meaning of that doctrine can be seen now in the World War. Is that internationalism?

Again, internationalism need not consist in doing away with the feeling of nationality in the individual, any more than patriotism does away with the attachment to one's city or one's house or one's family. In fact, differentiation and integration have been proceeding all along and at the same time in the development of mankind, just as in the development of individual states and other groups.

It is also a mistake to think that psychological internationalism may be based only, or mainly, on class, or, to be more outspoken, on economic interests. The "international union of proletarians" just as an international union of industrial magnates or of landlords, would and could only be the realization of the community of one among the many common interests between the different groups of men.

In general, psychological internationalism consists in the

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said, on September 27, 1918 (New York Times, September 28, 1918, p. 1, col. 4): ". . . no special or separate interest of any single nation or any group of nations can be made the basis of any part of the settlement which is not consistent with the common interest of all. . . ."

[35] See Hayes, The History of German Socialism reconsidered, American Historical Review, October 1917.

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recognition of human solidarity, of a community of civilization (that is, of the system of ideas intended to smooth and adjust the conflicts of men, be they conflicts with nature or with other men), of a community of interests, and of the usefulness of co-operation in serving them.

Psychological internationalism is a realization and a tendency. To profit from the realization, and to further the tendency, is the object of legal internationalism, that is, of an international organization.

How much of the latter is there now? At present the system of international law is based on the conception of the "states" as units. International law is the result of agreements or understandings between states, that is, in fact, between their governments. In theory, and in many cases in practice, the treaties are simply contracts between "sovereigns" or "heads of states," even if (and this is a matter of the constitution of each "state," in other words, a matter to be decided by the political forces in each state) the consent of the legislative body be needed for the ratification of such treaties. In many cases the "state" has meant simply the ruler, or a clique behind him. But then, even that limited international law has been binding upon a "state" only if the state explicitly or implicitly agreed to be so bound.[86] And more than that, the German theory of the omnipotent state has been emphasizing that, if the existence of the state was threatened, international law would have to give way. For according to that theory the states do not exist for the sake of international law, but international law for the sake of the states. Moreover, the "state is higher than any single rule of law."[87]

The consequences of this state of affairs have been, generally speaking, just what Hamilton described them as being in the case of the Confederation of the thirteen states:

> ". . . . The great and radical vice in the construction of the existing Confederation is in the principle of legislation for states or governments, in their corporate or collective capacities, and as contradistinguished from the individuals of which they consist . . . . the consequence of this is, that though in theory their resolutions concerning those objects are laws, constitutionally binding on the members of the

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[86] E. g., Hall, International Law (7 ed.), 1917, 17.
[87] Jellinek, Allgemeine Staatslehre (2 ed.) 1905, 366.

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> Union, yet in practice they are mere recommendations which the States obey or disregard at their option. . . . ."[88]

These have also been the consequences of the present state of international law. Only in the case of international law the violations have been even more flagrant. And in addition, the position of the individual, especially in Central and Eastern Europe, has been deplorable. Legally speaking, the individual has been supposed to "owe allegiance" to a particular state or sovereign who owed his power to conquest, or to bargains with some other rulers, or to rules of inheritance of countries as if they were pieces of land. That rule of allegiance, or of "nationality," in the legal sense of the word, has, in a measure, been a relic of former ages, namely, of the conception of feudal fealty and the conception of belonging to a tribe in which one had been born. Yet that feudal fealty was based on a contract concluded by each individual, whereas nowadays men are sometimes supposed to "owe allegiance" to countries which they have never seen and with which they do not want to have anything in common. The individualistic point of view has not as yet been recognized in international law. In international law it is the state and not the individual that is considered as a unit. This works for the benefit of the state, or of the powerful classes in the state. There are, indeed, people owing no allegiance to any country (for instance, some of the Danes in Slesvig). Many aristocrats enjoy citizenship in several countries. The rulers of the different countries in Europe (most of them Germans or of German extraction) are not supposed to be bound by laws of citizenship—indeed it is interesting to note how groups which are exclusive as to their citizenship will submit to foreign-born princes. On the other hand, in the modern world the migration of citizens or subjects to foreign countries has been a fact against which all legislation has proved helpless, much as it has tried to prevent emigration for military reasons. In every civilized country foreigners are now protected, in most of them the admission of foreigners is hardly limited; generally speaking, a foreigner in any civilized country is subject to disabilities only so far as the so-called political rights are concerned, and even those are granted in some American states to men who have only partially complied with naturalization requirements. The *ius soli* in England and

[88] The Federalist, no. XV.

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America, while still a trace of the old status theory, operates in favor of a contractual conception of citizenship.[39] In the case of the British empire, its citizenship is practically a kind of inter-citizenship, and considering the area of the Empire amounts almost to beginnings of an international citizenship.[40]

This being the present state of affairs, what do we want? Let us listen again to President Wilson:

> ". . . . In every discussion of the peace that must end this war it is taken for granted that that peace must be followed by some definite concert of power, which will make it virtually impossible that any such catastrophe should ever overwhelm us again. Every lover of mankind, every sane and thoughtful man, must take that for granted. . . . There must be, not a balance of power, but a community of power. . . . Right must be based upon the common strength, not upon the individual strength, of the nations upon whose concert peace will depend. . . . When all unite to act in the same sense and with the same purpose, all act in the common interest and are free to live their own lives under a common protection. . . ."[41]

We want, then, a community of power, common strength, to give common protection. That means, first, some common rules as to the establishment and use of that power; secondly, somebody entitled to say when the case provided for by the rules has come about; thirdly, an executive to actually direct that power. How are we going to bring all this about? By international treaties in the old sense? This would, indeed, be no new suggestion.

More than two hundred years ago l'Abbé de St. Pierre suggested a definite organization of the Republic of Europe, with a legislature deciding in certain cases by a majority, with a judiciary, and an executive of its own.[42] That project of perpetual peace, so much more definite than, and superior to, the much-advertised and overestimated statement of Kant made nearly a century later,[43] has

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[39] McMurray, Inter-citizenship, Yale Law Journal, January, 1918, 309, ff.

[40] Id., 314.

[41] The President's address to the Senate, January 22, 1917, New York Times, January 23, 1917, p. 1, col. 5 and 6.

[42] An extract from his Mémoires pour rendre la paix perpetuelle en Europe (1712-13) was published, with a commentary, by J. J. Rousseau, and was translated recently by C. E. Vaughan (A Lasting Peace through the Federation of Europe, London 1917).

[43] See Kant, Perpetual Peace, trsl. M. Campbell Smith, esp. the remarks on democracy on pp. 125-127.

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come to naught. Instead, the conditions as they were in the eighteenth century practice were described by Hamilton in a way which still holds true of world politics to-day:

> ". . . . There is nothing absurd or impracticable in the idea of a league or alliance between independent nations for certain defined purposes precisely stated in a treaty regulating all the details of time, place, circumstance, and quantity; leaving nothing to future discretion; and depending for its execution on the good faith of the parties. . . . In the early part of the present century, there was an epidemical rage in Europe for this species of compacts, from which the politicians of the times fondly hoped for benefits which were never realized. With a view to establishing the *equilibrium* of power and the peace of that part of the world, all the resources of negotiations were exhausted, and triple and quadruple alliances were formed; but they were scarcely formed before they were broken, giving an instructive but afflicting lesson to mankind, how little dependence is to be placed on treaties which have no other sanction than the obligations of good faith, and which oppose general considerations of peace and justice to the impulse of any immediate interest or passion. . . . ."[44]

His words have been proved by later events to have been the very quintessence of wisdom. The attempts he had been observing in European politics were to be repeated; solemn promises and undertakings of Prussia and Germany, of Austria-Hungary, and of the Tsar of Russia, undertakings which resulted from the Congress of Vienna and the Congress of Berlin and The Hague Conferences were to be broken in the face of an incorrigibly surprised and credulous world. Shall the same experiments be the result of the present war?

We want common rules binding on all because they would be just the expression of our common civilization; we want a common court to apply, and supervise the application of, such rules; we want a common executive force to enforce them. We want, for instance, rules as to the abolition of armaments; we want rules abolishing oppression in nationally mixed districts, rules giving every human being a minimum of rights which nobody must violate. We want a superintending power which would co-ordinate the effects of psychological internationalism, the solidarity of mankind.

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[44] The Federalist, no. XV.

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Are we, then, to rely on voluntary agreements between "states"?

If not, Hamilton gives us further advice:

> ". . . . But if we are unwilling to be placed in this perilous situation; if we still will adhere to the design of a national government, or, which is the same thing, of a superintending power, under the direction of a common council, we must resolve to incorporate into our plan those ingredients which may be considered as forming the characteristic difference between a league and a government; we must extend the authority of the Union to the persons of the citizens. . . . ."[45]

Here is the essential point in the whole problem of world organization.

In the whole of chapter XV of the Federalist Hamilton points out the dangers of the other solution. He shows the tendency to indulge in a spirit of faction and resulting therefrom the eccentric tendency likely to prevail in each local group. He points out that it is natural to man to try to keep his own power, and that hence the central authority would naturally meet with a certain distrust. Therefore, the central authority might have to resort to compulsion. To Hamilton the principle of legislation for states appears as "the parent of anarchy."

But then, if we once admit legislation for individuals and hence the right of the central power to reach over the local groups as such, directly to the individuals within them, and also, once we admit the right of the individual to appeal in certain cases directly to the central judiciary, what is this? Is it not world federalism? A United States of the World?

It would be a pity to be frightened by a word. If that plan should prevail, there would be one common sovereign. There would be rules embodying the principle of the solidarity of all civilized men. Those rules would be common legal rules, they would form a common law of humanity, based on, and an expression of, a common civilization. It is that common law that would be the "impersonal" sovereign, it would charge the common organs with common official duties. There might be a common citizenship, that inter-citizenship suggested by Prof. McMurray:

> ". . . . it would not be very revolutionary to extend the analogy of interstate citizenship which now exists among the

[45] Id., no. XV.

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> states of our Union to an international citizenship among the states of the world. A citizenship in a world state would thus be created, not so very unlike that now existing in the British Empire. Indeed, that situation in practice almost exists to-day. . . ."[46]

And there might be an abolition of that economic inequality which has served as such a powerful promoter of discord and has served groups of profiteers at the expense of mankind. President Wilson has laid down, indeed, as one of his peace conditions:

> ". . . . The removal as far as possible of all economic barriers and the establishment of an equality of trade conditions among all the nations consenting to the peace and associating themselves for its maintenance. . . . ."[47]

The obstacles to the realization of the plan are smaller than they would appear at first. There is the question of distance between the different countries; yet modern engineering has reduced distances so considerably that the difficulty of communication in peace time is hardly greater nowadays between any part of Europe and America than between certain states of the Union in 1787. And again, the different states of Europe are closer to one another than Scotland and Australia or even Canada.

There is the question of language; yet Switzerland and Belgium, not to speak of that political monster called Austria-Hungary, have all been states with more than one language.

There is the question of local traditions, local institutions, local peculiarities; but these will not be done away with; national units will form part of the world organization, but will not be hampered in their development except in so far as their actions might run counter to the principle of the solidarity of mankind.

And if we speak of the consent of the governed, it seems likely that those governed will in most countries gladly consent to such a union. That seems true of the different groups in the East of Europe; the different national groups which will arise on the ruins of Tsarist Russia, and the states of the Balkans and those arising from the ashes of Austria-Hungary will in most cases gladly join with the other nations of the world to protect their own existence and to help promote civilization.[48] I could not say what the

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[46] McMurray, Inter-citizenship, Yale Law Journal, January, 1918, 314.

[47] The President's address to Congress, January 8, 1918, New York Times, January 9, 1918, p. 1.

[48] Read, for instance, the resolution of the congress of oppressed nations of Austria-Hungary held in Prague in May, 1918, and attended by

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attitude of the Scandinavian states and of Holland, Spain, and Switzerland might be, but some of them at least have for decades, in their own interest, been struggling for international friendship and understanding. Of course, measures would be necessary to consider the rôle which would be assigned to Germany, to German-Austria, to what would remain of Hungary, and to their associates, to Bulgaria, and to the small remnant of Turkey. But these are details to be settled without prejudice to the general plan.

And what of the Allies? Has not America, has not the British Empire been one series of lessons in the blessings of federalism in linking together distant parts of the world? By what legal term would one describe to the British Empire? And yet, however much its organization might puzzle German scholars, are those Britishers not fighting heroically side by side—English, Canadian and Australian, Welsh, Scotch, Irish and Boer? Do they not form a union with the French and the Portuguese and the Italians and the Americans, are they not under common command? Shall nothing come out of all the common sacrifices?

There should, there can be no opposition on the part of democracies; there may be on the part of autocracies. A citizen of one country may be a citizen of the world; the subject of an autocrat must be kept under the heel to serve in the army and to pay taxes. There will be opposition on the part of those vested interests that prefer to see "economic barriers."

As was mentioned before, the project of a world organization,

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representatives of the Czechoslovaks, Yugoslavs, Italians, Poles and Rumanians: "The representatives of Slav and Latin nations which for centuries have suffered under foreign oppression, assembled in Prague this 17th day of May, 1918, have united in a common desire to do all in their power in order to assure full liberty and independence to their respective nations after this terrible war. They are agreed that a better future for their nations will be founded and assured by world democracy, by real and sovereign national people's government, and by a universal League of Nations endowed with the necessary authority. They reject emphatically all steps taken by Governments without the consent of the peoples. They are convinced that the peace which they, together with all other democratic parties and nations, are striving for will only be a just and lasting peace if it will liberate the world from the predominance of one nation over another, and thus enable all nations to defend themselves against aggressive Imperialism. All the nations represented are determined to help each other, since the victory of one is also the victory of the other and is not only in the interests of the nation concerned but in the interests of civilization, of fraternity, and equality of nations and of true humanity." The Times (London), May 29, 1918, p. 5, col. 4.

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even of a world legislature, is not new. St. Pierre proposed a common legislature for the "Republic of Europe" at a time when, American independence being as yet a thing of the remote future, a "Republic of Europe" would be the "Republic of the World." But at that time there was as yet no sufficient psychological preparation, and there was as yet no way of providing an adequate executive. Since then, America has set the example of a practical settlement. Even before this war the bonds of union between different countries had been growing. Now practically the whole civilized world is united in its struggle against Germany and her allies, as representing the old order of things and expressing it in a particularly vicious way. Let us take to heart the words of Hamilton:

> ". . . . the kindred blood which flows in the veins of American citizens, the mingled blood which they have shed in defense of their sacred rights, consecrate their union. . . . But why is the experiment of an extended republic to be rejected, merely because it may comprise what is new? Is it not the glory of the people of America, that whilst they have paid a decent regard to the opinions of former times, and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense? . . . . Happily for America, happily, we trust, for the whole human race, they pursued a new and a more noble course. . . . They formed the design of a great Confederacy, which it is incumbent on their successors to improve and perpetuate. . . . ."[49]

Substitute "civilized mankind," or, if you prefer, "the Allies and associates", for "Americans." Improve, perpetuate, widen, for the good of the whole human race, the work of the leaders of American thought in those days. Then

> ". . . . the time shall come
> When man to man shall be a friend and brother."

Ludwik Ehrlich

University of California,
Berkeley, California.

[49] The Federalist, no. XIV.

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EDITORIAL NOTES

WESLEY NEWCOMB HOHFELD

WESLEY NEWCOMB HOHFELD, Southmayd Professor of Law in Yale University, formerly Professor of Law at Stanford University, an alumnus of this University, died at Alameda, on October 21, at the early age of thirty-nine years.

Mr. Hohfeld was recognized by his associates and by students of jurisprudence generally as standing in the first rank of American legal thinkers. Had he been spared a few years, he would doubtless have produced books that would have been a greater monument to his fame than the few articles, however important, representing his written appeal to the world. It is, indeed, in the nature of a tragedy that some of the greatest men in modern times have left but a few fragments to bear their message. The names of Ames and Thayer in the field of law spring at once to the lips along with Lord Acton's in the field of historical scholarship. And yet, after all, is not The Origin and Scope of the American Doctrine of Constitutional Law worth

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thousands of pages of the sort of production described by Sir James Fitzjames Stephen as "enormous receptacles of notes, comments, sections of Acts, and general observations which pass in England under the name of legal text-books"? So with Hohfeld's essays on Fundamental Legal Conceptions in the twenty-third, twenty-sixth and twenty-seventh volumes of the Yale Law Journal. The quality of these articles—incomplete as they are and in a sense mere sketches—commands the respect of all serious students of our legal system.

Hohfeld's mind was of that sensitive logical temper, almost Greek in its character, that a fallacy was to it as ugly as a deliberate falsehood. It had no patience with the so-called legal reasoning that hides behind metaphors and takes refuge in ambiguous phrases. It had the courage to attempt the Herculean task of stripping off the masks from legal commonplaces and showing their true nature, as distinguished from the accidental costumes which they wore, the legacy of history. Such work is comparable to that of the mathematician or the pure physicist or the philosopher. It is not of the sort which the mass of mankind appreciates, yet the entire structure of modern life rests upon the results of such workers' devotion.

While Hohfeld's genius led him to the problems of what has been called by a learned Frenchman "pure law", he was by no means one-sided. His interest extended to all branches. He recognized the importance of the efforts of the historical and sociological jurist, of the legislator, of the judge in re-defining the law and making it fit with other human institutions. He had the satisfaction of seeing some of his ideals put into force at the law school to whose service he devoted his last years. Truly, though his life was short, he achieved much—above all the satisfaction that comes to those who love truth and wisdom.

O. K. M.

CORRECTIONS BY CORRESPONDENTS

Mr. George M. Naus, of Oakland, calls our attention to an inaccurate statement in the July number of this Review at page 377, to the effect that "the California case of Albert Pick Company v. Jordan may no longer represent the law in this State." As our correspondent points out, the case was affirmed in 244 U. S. 647, 61 L. Ed. 1370, 37 Sup. Ct. Rep. 741. The writer of the

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note erred in good company, for, as our correspondent points out, Professor Powell of Columbia University made a similar oversight in his valuable article in the May number of the Harvard Law Review.

Mr. Delger Trowbridge, of San Francisco, cites the cases of Fowden v. Pacific Coast Steamship Company, 149 Cal. 153, Andrews v. Valley Ice Company, 167 Cal. 11, and Sherwin v. Southern Pacific Company, 168 Cal. 722, as settling the law so conclusively to the effect that an action for personal injuries does not abate by reason of the death of the injured person pending an appeal, that the omission to discuss the point in Hesler v. California Hospital Co., 56 Cal. Dec. 244, mentioned on page 466 of the September number, should not be a matter for comment. Though the Andrews case decides that such action does not abate, on the authority of the Fowden case without special discussion in a manner which accords with the law as it should be, it is not made exactly clear how the Fowden case in view of the court's reasoning in that case, is an authority in point.

The editor is grateful for these corrections, and regrets that readers of the Review do not more frequently avail themselves of the opportunity of correcting errors or combatting propositions made in its pages.

O. K. M.

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Comment on Recent Cases

CORPORATIONS: LIABILITY OF TRANSFERORS AND TRANSFEREES OF STOCK FOR CALLS.—The case of *Geary Street, Park and Ocean Railroad Co. v. Bradbury Estate Co.*[1] states the general rule as to stockholders' liability for calls. Where the stock has been transferred from a registered owner to another, who does not register the stock in his name on the corporation books, the transferee is under no liability to the company for calls.[2] The transferor is as between himself and the corporation the one who is liable,[3] and owner for all purposes.[4]

This liability, except in a few jurisdictions,[5] is quite independent of any express agreement to pay calls on the stock, either by the original subscriber,[6] or by his transferee.[7] By becoming a stockholder, a man assumes the obligation of that relationship toward the corporation, and its charter forms a contract between stockholder and corporation.[8] He therefore impliedly promises to pay full value for his stock according to the corporation's charter and the laws of the state governing such matters, and will be held liable on such implied promise.[9] The liability on this implied promise may be terminated only by transferring the stock on the books of the company in the way provided by its charter.[10] However when a transfer on the corporation books has been made, the new stockholder assumes all the rights and liabilities of his transferor and the former owner is discharged of all liability to the corporation.[11]

But even before a transfer has been made on the books of the company the transferor is entitled to compensation from his transferee for any loss to him as registered owner.[12] This liability of the transferee to the transferor does not rest on implied

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[1] (Sept. 28, 1918), 56 Cal. Dec. 312.

[2] People's Home Savings Bank v. Stadtmuller (1906), 150 Cal. 106, 88 Pac. 280.

[3] Brown v. Allebach (1908), 166 Fed. 488; Hawkins v. Glenn (1889), 131 U. S. 319, 33 L. Ed. 184, 9 Sup. Ct. Rep. 739.

[4] People v. Robinson (1883), 64 Cal. 373, 1 Pac. 156.

[5] Maine, New Hampshire and Massachusetts.

[6] Upton v. Tribilcock (1875), 91 U. S. 45, 23 L. Ed. 203.

[7] Webster v. Upton (1875), 91 U. S. 65, 23 L. Ed. 384.

[8] Brown v. Morton (1904), 71 N. J. L. 26, 58 Atl. 95; Loewenthal v. Rubber Reclaiming Co. (1894), 52 N. J. Eq. 440, 28 Atl. 454.

[9] Supra, n. 6 and 7.

[10] Hood v. McNaughton (1892), 54 N. J. L. 425, 24 Atl. 497.

[11] Hall v. U. S. Ins. Co. (1847), 5 Gill. 484 (Md.); Hartford and New Haven Railroad Co. v. Boorman (1838), 12 Conn. 530; Merrimac Mining Co. of Lake Superior v. Bagley (1866), 14 Mich. 501.

[12] Johnson v. Underhill (1873), 52 N. Y. 203, 212.

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contract,[13] but on principles of equity.[14] In other words, the relation between transferor and transferee is that of trustee and cestui que trust. The transferor is the legal owner, and as between himself and the corporation the sole owner. But the transferee is the real or beneficial owner, and while the legal owner is the one who must be proceeded against by the corporation, the beneficial owner must make good to him any loss incurred on his account, just as a cestui must compensate his trustee in similar cases.[15] The liability to compensate the registered owner lasts only so long as the transferee remains beneficial owner of the stock, this liability being passed on to the new equitable owner when the equitable interest is transferred.[16]

It is difficult to see why the corporation should not be allowed to proceed directly against the beneficial owner. He is the real party in interest, the one who derives all the benefit from the stock and who ultimately is obliged to pay calls and bear losses. He may also if he chooses force the corporation to register him as legal owner. Though the courts do not hold the equitable owner liable to the legal owner on implied contract, common sense tells us that when one man buys stock of another the real agreement which they intend to enter into is that the buyer shall take the stock and that all losses or gains in connection with it shall be his, and that the seller shall have absolutely nothing more to do with it, one way or another. It is the intention of the parties that the buyer shall pay all future calls and assessments. Why is this not an implied contract for the benefit of the corporation, of which it could take advantage and hold the equitable owner liable, without the necessity of proceeding against the holder of the bare legal title? It is certainly the result the parties intend to arrive at, where a bona fide sale is made, even though they neglect to go through the formality of registering the transaction on the corporation books. The legal owner should not be relieved of liability until the equitable owner is registered and becomes legal owner, because a corporation is entitled to know who its stockholders are and whom it can hold liable. But to allow a direct action by the corporation against the real owners of the stock as well as the legal owners, would lead to quicker and surer justice, and would tend to decrease the number of suits which the present system necessitates. And it seems that this result could be attained, without straining legal principles any more than has been done by the courts in a multitude of other cases, where such a view has been necessary better to subserve the ends of justice.

P. M.

[13] Richards v. Robin (1916), 162 N. Y. Supp. 12, 16, 175 App. D. 296.
[14] Amherst v. Kellog (1874), 75 Ill. 68.
[15] Castellan v. Hobson (1870), Equity Cases 10 L. R. 47.
[16] Humble v. Langston (1841), 7 M. & W. 517.

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ELECTION: DIRECT PRIMARY LAW: INELIGIBILITY OF CANDIDATE RECEIVING HIGHEST VOTE.—In the August State primary election, Wm. D. Stephens, present incumbent, received the highest number of votes for Governor on the Republican ticket. James Rolph, present Mayor of San Francisco, was another candidate on the Republican ticket. On the Democratic ticket Rolph was likewise a candidate and received the highest number of votes. Francis J. Heney and Thomas L. Woolwine were other Democratic candidates. The two latter were legally affiliated with the Democratic party, whereas Rolph was legally affiliated with the Republican party. The Direct Primary Law of 1913,[1] declares that, except as to judicial, school, county, township, or municipal officers, the person receiving the highest number of votes at a primary election as a candidate for an office of a particular party shall be the candidate of that party for such office; but the law was amended in 1917,[2] by adding the proviso that no candidate failing to receive the highest number of votes for the nomination of the political party with which he was "affiliated thirty-five days before the date of the primary election", should be entitled to be the candidate of any other political party. If Rolph had won the nomination of the Republican party, with which he was legally affiliated, he would have been also the candidate of the Democratic party, but having failed to become the nominee of the Republican party, he was, by the words of the above statute, disqualified from being the candidate of the Democratic party.

Under the above facts arises the case of *Francis J. Heney v. Jordan, Secretary of State.*[3] The state constitution authorizes direct primary laws in the following words: "the legislature shall enact laws providing for the direct nomination of candidates for public office, by electors, political parties, or organizations of electors without conventions, at elections to be known and designated as primary elections; also to determine the tests and conditions upon which electors, political parties, or organizations of electors may participate in any such primary election."[4] The Supreme Court has held that, under this provision, the legislature may prescribe any test for candidates for party nomination, which has a reasonable relation to the maintenance of the integrity of political parties, an obvious and authorized purpose of the primary law.[5] On the authority of this case and of a later case,[6] the constitutionality of the amendment of 1917 is sustained as a reasonable means of maintaining the integrity of political parties.

Rolph having thus been declared ineligible for nomination as

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[1] Cal. Stats. 1913, p. 1379.
[2] Cal. Stats. 1917, p. 1341.
[3] (Sept. 24, 1918), 56 Cal. Dec. 295.
[4] Cal. Const., Art. II, § 2½.
[5] Socialist Party v. Uhl (1909), 155 Cal. 776, 103 Pac. 181.
[6] Hart v. Jordan (1914), 168 Cal. 321, 143 Pac. 537.

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Democratic candidate for Governor, the question arises whether Heney, second in the poll, may be considered to be the Democratic nominee. In spite of almost uniform practice in American courts to the contrary, an opinion is prevalent that when the highest candidate is ineligible the next highest is to be regarded as elected or nominated. Perhaps the only case holding to this effect is an early Indiana decision.[7] This decision may have been partly based on a general doctrine that votes cast for an ineligible candidate are to be wholly disregarded, and partly on the special doctrine of the English courts that when the fact is notorious and directly brought to the attention of the voters that a candidate is ineligible or dead, votes for him are to be considered as thrown away, and so not to be taken into account in the final canvass.[8] But the rule of the American courts is thoroughly well established that when the candidate receiving the majority or plurality of votes is ineligible, no one has been elected.[9] The rule and its reason are well stated in the leading California case as follows:

"An election is the deliberate choice of a majority or plurality of the electoral body. This is evidenced by the votes of the electors. But if a majority of those voting, by mistake of law or fact, happen to cast their votes upon an ineligible candidate, it by no means follows that the next to him on the poll should receive the office. If this be so, a candidate might be elected who received only a small portion of the votes and who never could have been elected at all but for this mistake. The votes are not less legal votes because given to a person in whose behalf they cannot be counted; and the person who is the next to him on the list of candidates does not receive a plurality of votes because his competitor was ineligible. The votes cast for the latter, it is true, cannot be counted for him; but that is no reason why they should, in effect, be counted for the former, who, possibly could never have received them. It is fairer, more just, and more consistent with the theory of our institutions, to hold the votes so cast as merely ineffectual for the purpose of an election, than to give them the effect of disappointing the popular will, and electing to office a man whose pretensions the people had designed to reject."[10]

W. C. J.

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[7] Gulick v. New (1860), 14 Ind. 93, 77 Am. Dec. 49.

[8] King v. Hawkins (1808), 10 East 211, 103 Eng. Rep. R. 755; Regina v. Mayor of Tewkesbury (1868), L. R. 3 Q. B. 629.

[9] Saunders v. Haynes (1859), 13 Cal. 145; Campbell v. Free (1907), 7 Cal. App. 151, 93 Pac. 1060; State v. Bell (1907), 169 Ind. 61, 82 N. E. 69, 124 Am. St. Rep. 203, 13 L. R. A. (N. S.) 1013; Hanson v. Grattan (1911), 84 Kan. 843, 115 Pac. 646, 34 L. R. A. (N. S.) 240; Saunders v. Rice (1918), R. I., 102 Atl. 914, L. R. A. 1918C, 1153.

[10] Supra, n. 9.

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PRESCRIPTION: CONFUSION BETWEEN ADVERSE POSSESSION, PRESCRIPTION AND DEDICATION.—While it may make no difference in immediate result in a particular case whether it is said that a highway is established upon the principle of dedication, proved by long continued user by the public, or whether it is said that it is gained by prescription, carelessness in the use of language may lead to difficulty in practical conclusions. It is very certain that at the common law there can be no public way by prescription,[1] nor indeed any private easement either by grant or prescription except so far as appurtenant to another estate.[2] The difficulty with the acquisition of a public way by prescription is not alone that the public is incapable of taking property by grant—a reason no longer controlling since the "lost grant" theory of prescription is obsolescent.[3] Nor is the denial by the common law judges of the possibility of the creation of a highway by prescription under a twenty years' user merely a corollary from the abstract legal proposition that there can be no easement in gross in favor of an individual independently of his ownership of a dominant estate; hence none in favor of the totality of such individuals constituting the public. The true reason would seem to be the impolicy of a rule which would freely permit the creation of rights of a permanent nature in the land of another—a principle which has resulted in our law's limiting in rather an arbitrary manner the number of easements possible.[4] Lord Bowen said: "Nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused, and to drive them to prevent the enjoyment of things which, although they are matters of private property, naturally give pleasure to many persons besides the owners, under the fear that their good nature may be misunderstood."[5] Though the learned judge was speaking

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[1] Tiffany, Real Property, § 452 note; Bolger v. Foss (1884), 65 Cal. 250, 3 Pac. 871; State v. Kansas City etc. R. Co. (1876), 45 Iowa 139; Attorney General v. Antrobus (1905), 2 Ch. 188, 198 (per Farwell, J. "The public as such cannot prescribe"); Folkestone Corporation v. Brockman (1914) A. C. 338, Ann. Cas. 1914-D 320, 335; 2 Bl. Comm. 263-4; 22 Am. & Eng. Encyc. Law (2d. ed.), 1217-1218 ("The true doctrine seems to be that long use of a public easement is evidence of a dedication.")

[2] "It is clearly established now that there is no such right known to the law as an easement in gross." Goddard, Easements (6th ed.) 8. Even where the easement in gross is recognized, it is scarcely a property right, for it is generally held to be neither assignable nor inheritable. Jones, Easements, § 39.

[3] Unfortunately the "lost grant" theory of prescription can not be said to be wholly supplanted by the adverse user theory. It has frequently been referred to in California cases as the basis of prescription rights. Hanson v. McCue (1871), 42 Cal. 303; Sullivan v. Zeiner (1893), 98 Cal., 346, 33 Pac. 209; Clark v. Clark (1901), 133 Cal. 667, 66 Pac. 10.

[4] This even forbids the landowner to create burdens indefinitely. Brougham, L. C., in Keppell v. Bailey, 2 Myl. & K. 517, 537: "Incidents of a novel kind cannot be devised and attached to property, at the fancy or caprice of any owner."

[5] Blount v. Layard (1891), 2 Ch. 691 n.

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of the public right to fish, his language is equally applicable to a highway. The doctrine frequently recognized in American courts—often without noticing the fundamental difference between prescription and implied dedication—that a public highway may be established by prescription stimulates unsocial conduct on the part of landowners.[6]

The failure to distinguish between prescription and implied dedication tends to confuse the real nature of prescription. Thus, we find courts and lawyers in highway cases referring to the fact that the enjoyment of the road is had with the knowledge of the landowner—a fact which should be irrelevant in the establishment of a way by prescription, although a material element in proving dedication.[7] The amended complaint set out in *People v. Power* contained such language,[8] and while the court properly rests its opinion upon the theory of dedication, it quotes from Hartley v. Vermillion language which would seem to recognize the possibility of a highway by prescription.[9] The language quoted is, it is submitted, merely dictum, and no case in California has decided that a highway may be created by prescription. Indeed, the amendment to section 2619 of the Political Code in 1874 which struck out the provision to the effect that five years' user as such created a highway, would seem to indicate the legislative intent to abolish the doctrine of highways by prescription.[10]

There has been nearly as much confusion in our legal reasoning by reason of the failure to keep distinct the fundamental difference between obtaining of title to land by adverse possession and title to easements by prescription as by the accidental historical distinction between the two kinds of prescriptive title. It is cer-

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[6] Jones, Easements, § 457. See criticism of the prescription theory in respect to highways by Dixon, C. J., in the dissenting opinion in Hanson v. Taylor (1869), 23 Wis. 547, 554.

[7] In a private easement case the court says: "To make the user adverse it must have been with the knowledge and acquiescence of the owner of the land." Barlow v. Frink (1915), 171 Cal. 165, 152 Pac. 290. This should be true only where it is necessary to break a privity between the parties, as in the case of landlord and tenant. That the acquisition of an easement by prescription does not turn on the "acquiescence" of the owner is shown by the fact that his vigorous oral objections do not interrupt the running of the period of prescription. Cox v. Clough (1886), 70 Cal. 345, 11 Pac. 732. On principle it would seem that in cases of dedication, knowledge would be an important element. "In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate—there must be an *animus dedicandi*, of which the user by the public is evidence and no more." Per Parke, B., in Poole v. Huskinson (1842), 11 M. & W. 827, 830.

[8] (Sept. 10, 1918), 27 Cal. App. Dec. 317.

[9] (1903), 141 Cal. 339, 348, 74 Pac. 987.

[10] In Cordano v. Wright (1911), 159 Cal. 610, 622, 115 Pac. 227, Ann. Cas. 1912 C 1044, the Supreme Court seems to be of the opinion that since 1883 no highway can be created except by declaration of the Board of Supervisors of a county or by dedication of the land affected. See Cal. Pol. Code, § 2621.

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tainly desirable that the principles underlying adverse possession and those underlying prescription should be unified, that the fiction of the lost grant upon which the latter doctrine was formerly rested be abandoned, and that the facts of open, notorious and continuous possession or enjoyment be taken as the basis of both.[11] But there are essential distinctions between the two sorts of prescriptive title, arising from the fact that the one has to do with possession of land, the other with the use of the land. These elements of difference the courts often properly emphasize. For example, while they recognize that a judgment in ejectment without actual recovery of the possession does not interrupt the continuity of the adverse possession of law, they hold that a judgment obtained against an easement claimant does have that effect.[12] There could scarcely be a clearer recognition of the essential difference between the possession of land and the assertion of a right over it which does not affect the possession. The distinction indeed is so elementary that it is a matter of surprise that courts should ever confuse the two things, even though they be called by the same name. And yet it is unfortunately true that such confusion now and then occurs. Thus, we find counsel repeatedly urge that an easement is not gained by prescription, because claimant has not paid taxes upon the easement during the prescriptive period. To which the courts make the answer that the assessment of the easement is presumed to be included in the assessment of the dominant tenement.[13] The obvious retort should be that there is no statutory condition that taxes be paid in acquiring an easement, for the statute merely requires the possessor of land to pay taxes in order to establish title by adverse possession, and does not mention the claimant to a right in another's land. To be sure, both Chief Justice Beatty and Justice McFarland expressed doubts as to whether the provisions of section 325 of the Code of Civil Procedure requiring payment of taxes applied to easements.[14] But the surprising

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[11] Peoples Water Co. v. Anderson (1915), 170 Cal. 683, 151 Pac. 127.

[12] Alta etc. Water Co. v. Hancock (1890), 85 Cal. 219, 24 Pac. 645; Montecito Valley Water Co. v. Santa Barbara (1904), 144 Cal. 578, 77 Pac. 1113; Harmon v. Carter (1900), Tenn. Ch., 59 S. W. 656, expressly or impliedly hold that a judgment in trespass or a final injunction interrupts the continuity of the enjoyment. On the other hand, mere recovery in ejectment without actual possession taken under the judgment does not interrupt the continuity of possession. Hodgkins v. Peoples Water Company (1918), Cal., 171 Pac. 945. A fortiori an injunction against an adverse possessor does not have the effect of preventing the latter from obtaining title by adverse possession. Ludtke v. Smith (1916), Tex., 186 S. W. 266.

[13] Conradt v. Hill (1889), 79 Cal. 587, 21 Pac. 1099; Frederick v. Dickey (1891), 91 Cal. 358, 27 Pac. 742; Gartland v. C. A. Hooper Co. (1918), 170 Pac. 1115. See also Heilbron v. Water Ditch Co. (1888), 75 Cal. 117, 17 Pac. 65; Hesperia L. & W. Co. v. Rogers (1890), 83 Cal. 10, 23 Pac. 196; Oneto v. Restano (1889), 78 Cal. 374, 20 Pac. 743.

[14] Conradt v. Hill; Frederick v. Dickey, supra, n. 13.

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thing is that they should not have treated the proposition with the contempt that it deserved. That these learned and able judges should have given respectful attention to such a point and that it should not even yet have received its death blow indicates the ever present need of the careful distinction between rights of enjoyment and possession.

The dictum in Hartley v. Vermillion[15] to the effect that a highway may be gained either "by prescription" or by "implied dedication" is of a sort further to darken judgment in the whole field of prescription rights. Dedication implies an act on the part of the dedicator; prescription, on the contrary, in the sense which it has come to have in the modern law, rests upon the act of the claimant. The act of dedication may well be inferred by a jury from the fact that a defined road has long been used by the public, but the ultimate question is whether the evidence is of a sort to justify the finding of an act by the dedicator or an authorization by him of acts done by others. The attitude of the landowner in the normal case of a private easement by prescription where no privity of title exists between him and the easement claimant is or should be a matter of indifference; the claimant's attitude ought to be the important thing.

O. K. M.

PUBLIC UTILITIES: CONSTITUTIONALITY OF PROVISION FOR CONDEMNATION BY RAILROAD COMMISSION.—A decision of interest in interpreting the very large constitutional powers of the California Railroad Commission is that of *Marin Municipal Water District v. Marin Water and Power Company.*[1]

Section 47 of the Public Utilities Act[2] provides a scheme whereby certain classes of public corporations desiring to take over and operate an existing public utility, may proceed to acquire the property of such public utility. According to this section the value, or just compensation, to be paid for the property to be condemned is to be fixed by the Railroad Commission, leaving the question of right and power to condemn to the judgment of the superior court. The question in the present case is whether the transferring of the final fixing of value from the superior court, where it formerly lay, to the Railroad Commission of California is in conformity with the state and federal constitutions.

So far as the state constitution is concerned, section 23a of article XII, added in November, 1914, explicitly gives the legislature authority to confer such power on the Railroad Commission, and confirms section 47 of the Public Utilities Act. And as this amendment to the Constitution declares anything in the whole instrument inconsistent therewith of no avail, any other

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[15] Supra, n. 9.
[1] (May 27, 1918), 55 Cal. Dec. 793.
[2] Cal. Stats., Extra Sess., 1911, p. 55.

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provision on the subject of eminent domain is subordinated thereto.

In respect to the Fourteenth Amendment, the court holds that the compensation required by due process,[3] is secured; that while the ascertainment of just compensation is a judicial question,[4] the hearing before the Railroad Commission is of a judicial nature satisfying the requirements of constitutional law,[5] and that it is not requisite for due process that the compensation be fixed by a jury.[6] *W. C. J.*

WILLS: CONSTRUCTION OF DEVISE TO HEIRS OF TESTATOR.—In the *Estate of Watts*,[1] the Supreme Court of California, reversing the trial court, held that where a testatrix used the word "heirs" in her will without qualification, the word should be construed as including those entitled to succeed to property upon intestacy, as provided for in the Civil Code.[2] The court looked at the nature of the property and since the estate consisted entirely of community property belonging to the testatrix and her predeceased spouse, decreed that distribution should be made among her own and her husband's relatives.[3] Had the estate consisted of separate property, distribution would have been made to her relatives solely.[4]

In so deciding, the court gave effect to the well established principle that in construing the word "heirs" and determining who are entitled to take property in that character, the court should have regard not only to the origin of the property but also to the species of property that has been disposed of in the will.[5] In jurisdictions where personalty went to next of kin and realty to heirs, a general bequest of personalty to "heirs" would have passed to those who could have taken in that character under the local statutes of distribution; while a general devise of realty

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[3] Chicago, B. & Q. R. R. Co. v. Chicago (1897), 166 U. S. 226, 41 L. Ed. 979, 17 Sup. Ct. Rep. 581.

[4] Monongahela Navigation Co. v. United States (1892), 148 U. S. 312, 37 L. Ed. 463, 13 Sup. Ct. Rep. 622.

[5] Marin Water and Power Co. v. Railroad Commission (1916), 171 Cal. 706, 154 Pac. 864.

[6] Bauman v. Ross (1897), 167 U. S. 548, 42 L. Ed. 270, 17 Sup. Ct. Rep. 966.

[1] (Sept. 24, 1918), 56 Cal. Dec. 301.

[2] Cal. Civ. Code, § 1334; Hochstein v. Berghauser (1899), 123 Cal. 681, 687, 56 Pac. 547.

[3] Cal. Civ. Code, § 1386, subd. 8; Estate of Davidson (1913), 21 Cal. App. 118, 131 Pac. 67; Estate of William Brady (1915), 171 Cal. 1, 151 Pac. 275.

[4] Cal. Civ. Code, § 1386, subd. 3.

[5] Clarke v. Cordis (1862), 4 Allen 466, 480; Fabens v. Fabens (1886), 141 Mass. 395, 5 N. E. 650; Reen v. Wagner (1893), 51 N. J. Eq. 1, 26 Atl. 466; Estate of F. A. Comly (1890), 136 Pa. St. 153, 20 Atl. 397; Montignani v. Blade (1895), 145 N. Y. 111, 39 N. E. 719; In re Senson's Estate (1893), 55 Minn. 300, 56 N. W. 1115.

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would have been a gift to those who would have taken as heirs under the local statute of descent, if the testator had died intestate.

In England today, under the Inheritance Act of 1833, it is still the rule that descent must be traced from the last purchaser.[6] Respect is had to the origin of the landed property and the ancestor who acquired it by purchase.[7]

In Roman law, the word "heir" was construed to mean a universal successor.[8] Not only did the heir inherit the property of the deceased but he also continued the decedent's legal personality and succeeded to all his rights and liabilities.[9] Inheritance was a continuation rather than a succession.[10] The transmission of the personality of the deceased to the heir was emphasized. In the law of England and America, emphasis is laid on the transmission of property and rights, and upon individual, as distinguished from universal, succession.[11] The Roman heir approached somewhat the position of the common law executor or administrator so far as personalty was concerned,[12] or the position of a sole heir who was also sole executor; and still closer the position of the personal representative in jurisdictions where, as in England, since the Land Transfer Act of 1897, 60 & 61 Vict., c. 65, such representative holds title to all of decedent's estate, real and personal, pending administration. In Roman law the origin and nature of the property was not considered.[13]

But the Roman law had itself passed through at least three great stages, revolutionary in their changes, from the XII Tables, through the praetorian reforms to the 118th Novel.[14] As in early Rome, so in many other primitive legal systems, the analogue of what we call an "heir" was restricted by the rule of agnatic relationships. In many other systems, indeed all over the world today, are examples of junior right, like the old borough English described by Blackstone;[15] or of equal right, like the Kentish gavelkind;[16] or of senior right, as in the English primogeniture.[17] We have, indeed, never known these in America, for

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[6] 3 & 4 William IV, c. 106.

[7] Stephen's Commentaries on the Laws of England (16th ed.) Vol. I, p. 305; Mackenzie, Studies in Roman Law (7th ed.) p. 336.

[8] Maine, Ancient Law, p. 195.

[9] Dig. 50, 17, 59; Sohm's Institutes of Roman Law (3d ed., Ledlie) p. 504.

[10] Holmes, The Common Law, p. 343.

[11] Sherman, Roman Law in the Modern World, p. 234.

[12] Williams, Institutes of Justinian Illustrated by English Law (Bk. II, Tit. XIV) p. 125.

[13] Laurent, Principes de Droit Civil, Vol. VIII, p. 579.

[14] Hunter, Roman Law, p. 833.

[15] 1 Bl. Comm. (Jones' ed.) 823.

[16] Id., p. 825.

[17] Cecil, Primogeniture.

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they were never adopted as suitable to American conditions. Nor have we ever known the other canon of descent that preferred the males to females; although that rule had prevailed in many other systems than the English, e. g., the Athenian,[18] the Jewish,[19] the French,[20] and the German[21] down through the middle ages.

Very justly Tocqueville expressed his surprise "that ancient and modern jurists have not attributed a greater importance to the laws of inheritance. It is true they belong to civil affairs; but they ought, nevertheless, to be placed at the head of all political institutions; for, while political laws are only the symbols of a nation's condition, those which determine the descent of property, exercise an extraordinary influence over its social state. They operate in a uniform and certain manner. Man acquires through their means, a kind of preternatural power over the destiny of unborn generations. When the legislator has established the laws of succession, he may rest from his labours. The machine once set in motion will go on for ages; and advance, as if self-directed, steadily to a certain end, according to the bias originally impressed upon it."[22] New tendencies in the law of succession will ever appear, and be interesting, for no portion of the law reveals more abundant illustrations of the fact that law is only human circumstance and opinion, and changes with the alterations of these. The differences between our Anglo-American system of future interests and that of other countries illustrates a difference of traditions and policies which those who know only their own law are unlikely to imagine. The law of property especially calls for the attention of the student of human opinion,—we need more studies like those of McCulloch[23] and of Mr. Cecil.[24] But indeed every other field of the law would repay investigation from the same viewpoint.

R. P.

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[18] McCulloch, Succession to Property, p. 3.
[19] Deuteronomy xxi, 15, 17.
[20] Brissaud, History of French Private Law, pp. 634-638.
[21] Huebner, History of Germanic Private Law, pp. 729-730.
[22] M. de Tocqueville, de la Démocratie en Amérique, c. iii.
[23] McCulloch, Succession to Property.
[24] Cecil, Primogeniture.

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Book Reviews

CONSTITUTIONAL CONVENTIONS: THEIR NATURE, POWERS AND LIMITATIONS. By Roger Sherman Hoar. Little, Brown and Company, Boston, Mass., 1917. pp. xiv, 240. $2.00.

This book was written by Mr. Hoar, former State Senator and Assistant Attorney-General, in his capacity of member of the Commission to Compile Information and Data for the use of the Massachusetts Convention of 1917. It is a thoroughly sound and reliable work. Its aim is practical, but it is infused with the necessary theory and principle of government. It forms an indispensable supplement to the older work of Jameson on "Constitutional Conventions" and to the later work of Dodd on "The Revision and Amendment of State Constitutions." As one could not today go to the semi-classical treatise of Jameson without also consulting Dodd for additional information and for correctives, so one having occasion to consult Dodd must avail himself of the later researches of Mr. Hoar. Not only in information and detail is Hoar supplementary to Jameson and Dodd, it furthermore occupies a field not covered by them. That is to say, it is written from a legal point of view, which is not the case with the older books.

Mr. Hoar says in the preface: "The fact that there is no modern or even ancient accessible work on the nature and powers of constitutional conventions, has led me to attempt to fill the gap with the present book, which represents no preconceived theory, but rather merely an impartial collection of all available law and precedent." We only need say that the "gap" has been very satisfactorily and adequately filled.

W. C. J.

INHERITANCE TAXATION. By Lafayette B. Gleason and Alexander Otis. Matthew Bender & Company, Albany, N. Y., 1917. pp. lviii, 836. $7.50.

This work is not a learned exploration into the sources and nature of law. It is hot from the conflict in the courts and legislatures of today, a five o'clock edition. In 1919 there will be so much amendment and so many new decisions that a later edition will doubtless be required. The rapidity with which much of the work must necessarily have been done accounts for the few minor blemishes. The authors are practical men engaged in the enforcement of the New York law and are full of their subject. The law is a development of the last few years and the decisions based almost entirely on statute. The book has been written to supply a present need and it accomplishes its object well. The principles are stated, most of the decisions are given, and appropriate comments made. But the book has a

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great deal more to make it useful. The statutes of each state and of the United States are given in full; also the address of each state inheritance tax collector, the particular mortality table in use in each jurisdiction, the district collectors of internal revenue and a table of cases by states. The decisions in California seem complete except for a few cumulative citations. The book is a useful manual for the local practice of each jurisdiction and a great time-saver in ascertaining the law of other states, a consideration of increasing importance when so many persons have property interests in more than one jurisdiction.

A. M. K.

THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW: A Contribution to the History and Theory of Juristic Persons in Anglo-American Law. By Gerard Carl Henderson. Harvard Studies in Jurisprudence Vol. II. Cambridge. Harvard University Press, 1918. pp. xix, 199.

This is an essay written in successful competition for the Addison Brown Prize at Harvard Law School. It is, we understand, the production of a student at that school. If so, American jurisprudence may well expect important service from the author. The present essay is worthy of any legal writer.

Mr. Henderson wisely confines himself to a monographic treatment of a limited field, or rather the segment created by the overlapping of several fields—corporations, conflict of laws and constitutional law. And this small segment of the immense field of legal doctrine he does not attempt to explore by an examination of the entire body of American law, but in the main through an investigation of the decisions of the Supreme Court of the United States. This method of treatment adds to the practical value of the book. The lawyer who has to examine any of the important questions relating to jurisdiction over foreign corporations, the power of the states to exclude them, their citizenship under the judiciary clause, their position under the fourteenth amendment, indeed, any question affecting their constitutional position, will do well to consult Mr. Henderson's Essay. Not only will he find there an acute and thorough analysis of the actual decisions, but he will often procure a clue that will aid him in discovering the inarticulate minor premiss underlying many a conclusion. While tracing the thread of opinion and of social, political and economic influences which lead to the modern corporation concept, the author never loses sight of the actual.

To characterize the spirit of the book briefly, we might say that the author's theory of law is realistic. He does not proceed from metaphysical theories of rights and duties but from experiential facts concerning that form of group legal life which for convenience we term the corporation. He shows how many

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of the difficulties in which the Supreme Court of the United States has been involved in its decisions concerning foreign corporations are due to the fact that it has been attempting to fit actualities into the language of metaphysics. Mr. Henderson's words concerning the decision in Muller v. Dows, "The language has almost a theological flavor," are applicable to many expressions of the Court concerning corporations. The corporation is not primarily an entity, existing independent of and apart from its members; nor is it on the other hand merely a group of stockholders who have appointed certain persons their agents to manage the affairs of the group. "The directors, officers, agents, and employees from president to common laborer" are the "active productive element" in the corporation. "The modern stockholder is a negligible factor in the management of a corporation."

For many years lawyers and business men have been conscious that the word corporation connoted as many diverse kinds of corporation as the word dog involves varieties of that animal. There is as much difference between a "one man" corporation and a great national industrial or railroad company as between a Japanese pug and a St. Bernard. One of Mr. Henderson's great merits is that he brings into relief the importance of these differences, while at the same time he suggests hitherto undeveloped relations between the corporation and other legal institutions. Its relations with the partnership, the joint tenancy, and with other forms of collective ownership and liability have for a long time been sufficiently obvious, but, though the point of view is not new, it is perhaps doubtful whether many lawyers or public men have thought of the close connection between political theories and the institutions of society, including the State itself, and the private corporation.

While many of our juristic studies are but discussions of nomenclature or classification, important perhaps as furnishing material for a good filing system for legal ideas, but almost entirely arid so far as direct practical results are concerned, Mr. Henderson's essay is a positive contribution of the most far-reaching importance in bettering our economic and legal systems. Nay, even the problems of world politics are more clearly beginning to present themselves as after all problems in group control and in group psychology, of which the study of the corporation presents but one side.

O. K. M.

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The Applicability of the Torrens Act in California

THE arguments for and against the Torrens Act have usually been partisan, heated and overdrawn. It will be a long time before practical experience awards the decision and in the meantime the discussion must be to a considerable extent theoretical, even when confined as this article is to the desirability of the act under the conditions prevailing in the State of California. Any discussion at the present time must be based on what will probably happen, not on what has happened. Arguments confidently advanced fifteen years ago can be maintained no longer, and there is probably a concensus of agreement on the following points:

1. The Torrens Act is, in its broad general features, constitutional and a scientific method of solving the land transfer problem.[1]

2. The question of its enforcement in California is to be determined for the most part on practical grounds of economy and safety, not on legal considerations.

3. In foreign countries the history of their law, the present state of land titles, the social customs, the absence in general of constitutional limitations, the diversity in the laws—all make foreign experience of little value.

4. In the United States of America the act has not been in operation over enough land to enable anyone to see whether it would work as well as the older system if applied to all the land in the state, for it must be remembered that any system works fairly well if there are only a few transactions. It is their multiplicity which causes the trouble.

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[1] Robinson v. Kerrigan (1907), 151 Cal. 40, 90 Pac. 129. See American Land Co. v. Zeiss (1910), 219 U. S. 47, 55 L. Ed. 82, 31 Sup. Ct. Rep. 200; Devlin on Real Estate, Chapter XL; 1 American Bar Association Journal, p. 3, collecting authorities.

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The comparison must therefore be made between the Torrens and other competing systems by assuming all the transactions to be taking place in turn under each system. Under the California Civil Code, which at the present time governs the vast majority of transactions in realty, every instrument in writing affecting real property may be recorded and with the exception of leases not exceeding one year, must be recorded to be constructive notice to those dealing with the property.[2] Recordation consists in copying the instrument verbatim into the appropriate book and indexing under the names of the parties. To get the history of a title from the Recorder's office one must therefore look through all the patents, grants, etc., until he finds the proper governmental source and then by means of the name indices run that title down. It is really more difficult than that, because under our law a person may grant land which he does not own and if he ever acquires it title immediately passes to his grantee. In other words, one must not only run down changes of title but must ascertain at his peril what each owner may have done with the land before he got it. This rule of the passing of title by estoppel is a mistake and should never have been enacted in the Code.[3] The title passing by estoppel should be merely between the parties, it should not be the legal title. Recordation should not constitute constructive notice thereof.[4]

The practical impossibility of running down titles led to the formation of abstract companies who gave an abstract of the title as it appeared in the above records. From this abstract an attorney could pass on the title as it appeared of record and this had to be done every time a conveyance or mortgage was made, each time going back to the beginning. A simple statute of repose limiting the time one may go back to thirty or forty years would relieve some of this difficulty. No one, however, defends the abstract method for city purposes, although it is still used in the more backward counties of the state. The sensible solution was found by companies which keep property indices. In connection with each subdivision of property every instrument affecting that piece is posted. When the title has once been run down on a particular subdivision it never has to be done again except for subsequent transactions. If blanket

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[2] Cal. Civ. Code, §§ 1213-1215.
[3] Cal. Civ. Code, § 1106.
[4] Rawle on Covenants for Title, Chapter XI.

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conveyances, such as "All my property in the City and County of San Francisco", were refused recordation it would simplify somewhat the keeping of property indices.[5] The modern method based on the recording system is for the abstract companies to assume the title insurance business. With their abstract plant they can readily ascertain the state of the title and can issue a policy of insurance to anyone interested. What are the objections to this system?

(1) It necessitates copying in the record books lengthy instruments such as deeds and mortgages. A remedy for this to some extent is to use short forms. The Code provides a short form for deeds and a few real estate men use it. In England the clauses usually inserted in a mortgage are contained in a statute. They need not be and as a rule are not included in the instrument itself. Decrees and other instruments could be substantially shortened.

(2) The policy of title insurance, insuring as it does only the title as of record, does not, at any rate in San Francisco, cover adverse possession or other possessory interests, such as leases, nor does it include easements, overlaps, encroachments or any of those matters which may be ascertained by an examination of the premises.

(3) The time required to get a policy of title insurance in San Francisco is usually from one to four days. Whether this can be improved under the Torrens system is much disputed.[6]

(4) Title insurance, like all other kinds, shows a gradual progression. In the beginning the effort seemed to be to avoid all work, to take no chances and to do as little as possible for the money. To a greater or less extent in different parts of the country this attitude has changed. The ideal service would be to take entire charge of the transaction for both parties, examine the records, examine the premises, make surveys if necessary, prepare the deed if desired, close the transaction, and issue a complete policy without exceptions other than actually existing defects; for after all, what the average buyer wants is the land itself and if

[5] Transactions of the Commonwealth Club of California, Vol. VIII, No. 8, p. 450. In this number the applicability of the Torrens Act to California conditions is discussed.

[6] Batchellor, 9 Case and Comment, 725. "But the orderly administration of the system, even under the best circumstances, requires an interval of three or four days for the regular dispatch of the business. If there are any complications, more time is required." See also San Francisco Recorder, April 17, 1914.

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by any chance he should not get it, complete indemnity. It should not be necessary to add to the expense of a cash sale or mortgage by calling in a lawyer.

(5) Cost.—If the cost is greater than the value of the service or the service is inadequate, or if the monopoly of title insurance companies brings monopoly evils there is a comparatively simple solution. Let the state take over the title insurance business and give better service at a cheaper rate if it can. Curiously enough, however, people hold up their hands in horror at the rank socialism involved in the state taking over the title insurance business, yet many of these same people have no objection whatever to state insurance when it is included in the Torrens Act.[7] They are perfectly willing to swallow the gnat of state title insurance when it is attached to the Torrens camel. Whether it is better to leave the business of title insurance in private hands is not the subject of present discussion. The writer holds no brief for the title insurance companies, is not interested financially or otherwise, directly or indirectly, in any title insurance company, and is perfectly neutral on the question of private versus state title insurance. The purpose of the discussion up to this point has been to point out that with a few simple legislative changes and shortening of legal forms and the extension of the title insurance service there would result the maximum efficiency in this method of land transfer which may be termed the title insurance method. Under it every instrument is copied into the proper official record book, the indexing is done by names; private companies keep property indices; the party interested is protected by title insurance. It now remains to compare this system with the Torrens.

At the outset it should be noted that many of the advantages claimed for the Torrens system do not apply to the conditions as they exist in San Francisco, Southern California, and many other portions of the state.

1. Few titles are seriously defective. There is therefore no need of a wholesale establishment of titles. When a title occasionally bcomes incurable by ordinary means there are other satisfactory methods of making it good.[8]

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[7] The original Torrens Act in California, Statutes 1897, p. 138, contained no insurance provision. The initiative measure, Statutes 1915, p. 1932, known as the California Land Title Law, supplies this defect.

[8] Cal. Code Civ. Proc., § 749.
Report of New York State Bar Association, Volume 31, 1908, at

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2. Under title insurance in California it is not necessary to search the title from the beginning more than once. In fact an examination of the arguments of the Torrens proponents will disclose that many of them do not apply to a state like California. The comparison is usually made between an ideal Torrens system, one that has not been tested as yet as a general system anywhere in the United States of America with an obsolete recording system with abstracts for each transaction, a system existing only in smaller counties where it is generally conceded that the Torrens system would be very expensive and where the abstract method is the cheapest. A perfectly fair comparison should therefore be made between the perfected title insurance system and the perfected Torrens system, for it should certainly be conceded that much more legislation will be necessary to bring the Torrens system to its maximum efficiency than to improve the title insurance system, which has had the advantage of practical operation for many years.

What then is the Torrens Act? "The object of the system is: first, to secure by a decree of court, or other similar proceeding, a title which shall be impregnable against any attack, and, when this title is once determined, to provide that all subsequent transfers, incumbrances, or proceedings affecting the title shall be placed on a page of the register and marked on the memorial of title."[9]

What are the objections to this system?

1. Initial cost.—It is assumed that if the Torrens Act is superior to the present system it should be generally adopted. To do this would require many years. The suggestion has been made that land be brought under the act at the death of each owner, so that in a generation or two most of the land in the state would be under the Torrens system. The records of San Francisco having been destroyed by the fire of 1906, the so-called McEnerney Act was passed to enable titles to be established of record. Over 36,000 actions have been brought for this purpose. At

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p. 412, has a statement from Judge Davis of the Massachusetts Land Court. "As to the great majority of the titles as now existing and dealt with in Massachusetts, I think that there is no particular reason at the present time for their registration. I do not believe in a compulsory act. I should be exceedingly sorry to see ours made compulsory in any respect." This volume, 31, of the New York State Bar Association for 1908, contains an elaborate report on the workings of the Torrens System in each country.

[9] Devlin on Real Estate, § 1439.

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least as many would be brought under the Torrens system, for while separate owners may unite in a single action it is not probable that many will, and the saving in the initial filing fee made thereby is soon overbalanced by the complexity. It is probable that the cost of the McEnerney Act exceeded fifty dollars on the average to the plaintiff in each action. The cost to the people of San Francisco has undoubtedly been in excess of two million dollars. It does not seem possible to put the Torrens Act into operation for anything like that sum. The McEnerney Act is a simple statute of eighteen sections, the Torrens a complicated one of one hundred and fifteen. A survey must be provided; this usually costs about twenty-five dollars. In many cases an abstract will be necessary and a report thereon. There will doubtless be contests and in some cases juries will be demanded. In many proceedings stale claims will be asserted that would otherwise never have been thought of. The service of the summons is difficult and expensive, as the adjoining owners must be personally served as well as all those who have or appear to have any interest. These adjoining owners and others who have an interest will find it necessary to take the matter up, employ counsel and have an appearance entered.[10] Owners of property, their neighbors and others having interests therein as mortgagees and lessees have done nothing wrong; their titles are good. Why should they all be compelled at their own expense to litigate their respective claims? Unless the advantages of the Torrens Act after the original registration are overwhelming this consideration of first cost alone is enough to condemn the system. The estimate of costs of four million dollars for a San Francisco and twenty million dollars for the entire state seems moderate.[11]

2. The attack on the Torrens system has usually been made upon legal grounds, pointing out various inconsistencies in the act and possibilities of injustice. Experience in other lines has shown that it is possible to conceive of a multitude of objections which in actual practice do not arise. There is, therefore, danger in accumulating theoretical legal difficulties. It is not the purpose of this article to go into the legal phases; this has been done exhaustively by others. A few of the objections may, however, be mentioned briefly:

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[10] Cal. Land Title Law, §§ 5-12.

[11] Transactions of the Commonwealth Club, Volume VIII, No. 8, p. 456.

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(1) If A is the registered owner of land and a forged instrument is registered to C and a new certificate is issued to C, C gets no title under the Torrens system and apparently has no recourse against the insurance fund. It is C's misfortune that he has not dealt with the registered owner. If, however, C should then sell to D, D would prevail over A, according to the wording of the act.[12]

(2) On the foreclosure of a mortgage or other encumbrance, other persons having an interest in the property may be irrevocably cut off without service on them, if this can be done constitutionally. Is it constitutional to deprive a person of his property through no fault of his own? Has he had his day in Court? Is the Recorder a judicial officer for this purpose? As shown above the Torrens certificate is not conclusive. That it is not conclusive is also shown by the fact that most purchasers of Torrens certificates and most persons taking mortgages on Torrens land find it necessary to take out title insurance, a wise precaution for the above and for other considerations which will be taken up later.[13]

(3) If the initial proceeding is invalid can it be said that the land has been brought under the act? Is it not then necessary to examine the initial proceedings just as the McEnerney decrees are scrutinized by the searchers of title today? The many defects found in McEnerney proceedings show how often this will be the case with Torrens titles.[14]

(4) If the initial proceeding is taken without notice to one who is actually in possession will that person's title be taken from him?[15]

(5) In subsequent transfers which are made without judicial decree, can title be taken away by the act of the administrative officer like the recorder?[16]

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[12] Cal. Land Title Law, § 38. Apparently otherwise if the forger gets possession of the duplicate certificate, § 60.

[13] San Francisco Recorder, April 17, 1914; In re Riley (1913), 120 Minn. 210, 139 N. W. 361.

[14] Henry v. White (1913), 123 Minn. 182, 143 N. W. 324. "If the want of jurisdiction due to the failure to serve known claimants appears affirmatively from the judgment roll itself, the judgment is void as against such claimant and may be attacked collaterally."

[15] Niblack, § 215; State v. Westfall (1902), 85 Minn. 437, 89 N. W. 175.

[16] Niblack, p. 110. "In this connection it must be remembered that a certificate signed by an administrative officer is not necessarily in and of itself conclusive evidence of the matters of fact and of law set forth and declared therein, and a legislature in this country may not enact a law making evidence conclusive which is not necessarily so in and of itself.

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Leaving the legal objections the argument of Torrens proponents is based on its simplicity and economy. Let us see how it will work out in practice.

Take a purchase of real estate. What must be done under each system? Under title insurance a deed is executed and copied into the record by the recorder; indexed under the names of the parties; the work is so simple that mistakes are not frequent, and it is not necessary for an attorney recording a deed to see that it is properly copied into the record. Under the Torrens system the deed must be executed. For a simple deed, without limitations, trusts, registrations, conveyances, etc., the short form on the duplicate certificate may be used, but as we have seen a short form of deed may be employed under the present system, so the saving here is slight. Under the Torrens system the deed is not copied into the record; but the essentials, names, description, etc., must be copied twice, once on the original certificate and once on the duplicate. Perhaps some saving might be effected by making the duplicate a carbon copy, but the form which the certificate takes gives little if any advantage to the typewriter over ordinary longhand. Immediately on the deed being filed an entry must be made on the old certificate; later on the new certificate must be prepared; proper reference made on the old certificate, name indices made and the property indices posted corresponding to the record kept by the title insurance company. The transferee, if a natural person, must also execute an affidavit showing whether he is married and if so the name of his spouse and whether the property is community property or not. The parties, and especially the purchaser, must either attend in person at the registrar's office to close the trans-

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In judicial investigations the law of the land requires an opportunity for a trial, and there can be no trial of rights in registered property if a registration certificate is conclusive evidence of ownership in all courts and in all places, and if only one party may produce his proofs. To preclude a party from going behind a certificate of title issued in this country, and from showing the truth concerning the condition of the title, it would seem to be nothing short of invasion of the judicial province, of confiscation of property and of destruction of vested rights, without due process of law. It has been repeatedly held that in this country it is not within the legislative power to declare what shall be conclusive evidence."

P. 263. "With regard to the nature of the functions of the registrar in this country, the situation seems to be that if they are judicial they may not be exercised under our constitution, and if they are ministerial and quasi judicial they never can be the foundation for a conclusive certificate. Since the scheme of operation absolutely requires incontestable certificates, it can not be worked under our system of jurisprudence."

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action or the purchaser must acknowledge his name and address and leave it with the registrar.[17] Service at this address is sufficient in any future proceeding affecting the land. Thus every change of address must be acknowledged and recorded or risk incurred of an adverse judgment affecting the land taken without notice. Addresses are changed frequently in this state. Is it probable that the proper precautions will be taken? In the eight certificates in the book in San Francisco, the addresses are given as New York, San Francisco, etc. A notice to such an address would be rather unlikely to reach the person. The service of the title insurance companies as a clearing house, relieving the Recorder's office from the burdens involved in closing transactions, is thus lost under the Torrens system.

It would seem evident that the Torrens system involves more actual labor. But in addition to this suppose the deed contains conveyances, trusts, limitations, restrictions, mortgages, liens or encumbrances; a simple statement of that fact is all that is made on the certificate with a reference to the original document. There is thus a saving in copying under the Torrens system, but so long as the limitations, etc., continue to exist the reference must be copied into the new certificate every time the land or a part thereof is transferred. Think what this means in tracts containing building restrictions, for example, restrictions which may last many years or perpetually. There is the labor involved in repeated reference copying; the danger of mistakes; the necessity of everyone interested, lien-holder, mortgagee, etc., being constantly on the alert to see that his interest is properly carried forward on each transfer. No attorney for the purchaser or any one else interested in the property would feel safe or be considered to have done his duty unless he followed the transaction up and saw that the interest he represented was properly put on the proper certificate, for the certificate is the title under the Torrens system. As wealth increases the agreements affecting real property are apt to become more complicated. People tie up their property with intricate trusts, settlements, building restrictions, covenants running with the land, etc. These most important provisions will not be found on the certificate except by reference to the original documents, which are on file in the registrar's office. Filing the documents themselves is a loose scheme very difficult to keep in order; separate documents that

[17] Cal. Land Title Law, §§ 48-54.

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must often be consulted are peculiarly liable to loss. This, however, is not all. Of the twenty thousand conveyances, mortgages and deeds of trust every year in San Francisco many must have concerned community property. Every conveyance under the Torrens system must state whether the property is separate or community and give the name of the spouse. If community, both spouses must join in any subsequent conveyance or encumbrances.[18] If, however, one of the spouses has died, then a special court proceeding must be brought to establish that fact. This must also be done whenever a name is changed by court proceedings, divorce, marriage, adoption, etc.[19] The last legislature protected the community interests of the wife by requiring her signature to instruments affecting the land. A purchaser in good faith, however, from the husband is protected by a presumption which the next legislature will probably make conclusive.[20] There is no such presumption under the Torrens Act, however, and the number of conveyances that will be delayed until a special proceeding before the Superior Court has straightened the matter out will certainly be large. Our Superior Courts in San Francisco are in some departments months behind in their work. The clogging of court proceedings by the initial registrations under the Torrens Act and by the special proceedings subsequently necessary is not going to promote a speedy hearing of litigation, nor are the fees of the attorneys who must bring these special proceedings to be left out of consideration in computing the cost. Owners must keep at their peril the duplicate certificate issued, for if lost the owner can do nothing with his land until by a proceeding in the Superior Court the duplicate certificate has been restored.[21] Every lien claimant or encumbrancer of any kind must before filing his claim ascertain the land affected by examining the certificate in the registrar's office, identify his claim and then see that the claim is actually entered correctly on the proper certificate. It is thus apparent that not only the physical and mechanical operations, but the care and diligence of the parties or their attorneys and the skill required of the registrar are all much greater than under the recording system. It should be realized that a purchaser of a Torrens title must

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[18] Cal. Land Title Law, § 57.
[19] Cal. Land Title Law, § 28.
[20] Cal. Civ. Code §§ 164, 172.
[21] Cal. Land Title Law, § 27.

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get the duplicate certificate of the vendor with the proper conveyance, ascertaining at his peril the identity of the vendor; examine the original certificate to see that no liens, etc., have been put on the land since the issuance of the certificate; wherever there are such liens, etc., examine the original documents, examine the blotter, for while the requirement is that each instrument be indexed immediately on the old certificate, this may not be always possible; must take his chance that the initial proceedings bringing the land under the Torrens system were valid and the subsequent transfers within the constitutional powers of the registrar, that the court proceedings on change of name, death of spouse, etc., have been properly taken that there is nothing affecting the land in respect to the matters excepted under section 34 of the Land Title Law. When one considers these things, is it any wonder that the purchasers of Torrens titles take out policies of insurance? Would any prudent man do otherwise? But if this risk or expense must be incurred with every transaction, what is the value of the Torrens Act? The mechanical operations are greater, the work of the attorneys more arduous and responsible, and the expense of title insurance is not eliminated unless the above risks are assumed; yet Torrens proponents claim that all the above work can be done in a few minutes. Such has not been the experience in Australia or Canada.[22] Is it probable that it can be done sooner in California if the system should come into general operation? About one hundred instruments a day affecting real property are recorded in San Francisco; many more would have to be recorded under the Torrens system. The certificate would have to be consulted in advance before any of these transactions take place. The use of the certificate books, the latest being in greatest demand, would be enormously increased over anything now in the Recorder's office. There are about one hundred and fifty-five thousand pieces of land separately assessed in the Assessor's office in San Francisco. Under the Torrens Act it would be necessary to have almost as many seperate certificates, requiring many volumes, the number constantly increasing. No advantage could be taken of the title insurance companies' duplicates unless the parties employ the title insurance companies. That anything like the present expedition in transfer could be attained seems

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[22] Supra, n. 6.

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highly improbable. The oft-repeated assertion that any purchaser of a Torrens title can go into the Recorder's office and satisfy himself in a few minutes as to the validity of the title is nothing short of reckless mendacity. Almost as bad is the statement quoted without disapproval by Cameron that land may be transferred on the faith of the duplicate certificate.[23] The function of the duplicate certificate issued to the land owner is to minimize the danger of forgery and impersonation in a subsequent transfer. The duplicate certificate is no evidence of the real state of the title any more than a policy of title insurance issued by a title insurance company. On a new transaction the title must be run down from the date of the certificate, just as the title insurance company must run the title down from the date of issuance of its last policy. The assertion that the registered owner under the Torrens Act carries the title with him is a patent absurdity.

Take mortgages. Most of the considerations above mentioned as to deeds apply here to mortgages. In addition it should be mentioned that the owner of property subject to a mortgage can at any time bring proceedings under the Torrens Act, omit the mortgagee and obtain a certificate cutting him out. The mortgagee may have an action against the mortgagor, but the Torrens Act is designed to facilitate transfers; it is intended to furnish a ready market for a thief to dispose of his plunder. Let the mortgagor transfer the property after obtaining a decree without mentioning the mortgage and the mortgagee's interest in the land has gone forever unless he is protected in some way by the state or federal constitution. Apparently a purchaser who bought from the dishonest mortgagor with knowledge of the fraud perpetuated would not be affected thereby.[24] In other words in the State of California today every mortgagee to be safe has to keep a strict watch on his land lest it be registered under the Torrens Act without his knowledge. The act constitutes a menace to every savings bank and trust company. After land is registered the mortgagee is subject to the danger that in some future conveyance by the mortgagor his mortgage may not be carried forward to the new certificate. He is also subject to the operation of any laws the legislature may choose

[23] Cameron, The Torrens System, p. 44; Report of New York State Bar Association 1908, Vol. 31, p. 410, Judge Davis says, "It is a popular fallacy that a layman can take a registered certificate of title and deal with it with perfect safety. He can not."

[24] Cal. Land Title Law, §§ 36, 34, 39. The sections are ambiguous.

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to make limiting the rights under his mortgage.[25] It is true that for the above losses an indemnity fund is provided. But there can be no recovery against this fund until the plaintiff has first exhausted any rights of action he may have for the recovery of the land. When this has been done he may then bring an action against the state treasurer to recover out of the insurance fund, all of course at his own expense for attorney's fees, etc., without possibility of recompense therefor.[26] Do mortgagees consider this action the equivalent of the security in the land which they had before the passage of the Torrens Act? Is it surprising that mortgagees insert a provision in mortgages declaring the entire amount secured by the mortgage due at once if a proceeding is commenced to bring the land under the Torrens Act?[27] There is also a danger to the mortgagor; he is now safe if he pays the principal or interest to the holder of the mortgaged note, whether there is an assignment by the holder of the note or not.[28] Apparently under the Torrens Act mortgagors must ascertain from the record whether such assignment has been made before making any payment.

Trust deeds were specially provided for in the former Torrens Act in California, but not under the present. It would seem necessary to go to the Supreme Court to find out who is the owner or the encumbrancer under the present act.

Take mechanics' liens. The same excess of labor under the Torrens Act will be found as compared with the present system. Incidentally it may be remarked that the provision of the present mechanic's lien law that the lien when filed relates back to the commencement of work is repealed.[29] Whether or not this relation back is desirable is not a subject for present discussion.

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[25] Cal. Land Title Law, § 44.

[26] Cal. Land Title Law, § 105. Mistakes are made now by the registrars, even with the limited amount of business, Shevlin-Mathieu Lumber Co. v. Fogarty (1915), 130 Minn. 456, 153 N. W. 871; 29 Harvard Law Review, 772.

[27] Wachs v. Broomell (1916), 274 Ill. 45, 113 N. E. 35. "A mortgagee or a trustee in a trust deed is liable at any time to be called upon to protect his interest in the real estate encumbered. If the trust deed or the mortgage so provide, the debtor can be required to repay all necessary expenses incurred by the mortgagee or trustee in protecting the interest of the creditor. If the creditor has not taken the precaution to make such provision in the trust deed or the mortgage, then he must bear this expense himself."

[28] Cal. Civ. Code, § 2935.

[29] Cal. Land Title Law, § 93. Mechanics' Liens must be put on the certificate within the statutory time, McMullen & Co. v. Croft (May 12, 1917), 164 Pac. 930 (Wash.).

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It is perfectly clear, however, that without the relation back provision the value of the lien is seriously impaired. Suppose a bill we introduced into the legislature to amend the mechanics' lien law by striking out the provision that the lien shall relate back to the commencement of the work. The lumber companies and other material men, building trades and other unions, would combine to bring such influence to bear that the bill would never get out of the committee. Nothing is more surprising than the acceptance of such radical changes by persons interested. It can only be explained by the general ignorance of and indifference to the Torrens Act. The passage of the act by initiative in 1915 is simply an example of the folly of direct legislation whereby the people voted on a measure over twenty pages long, which they did not read and which the great majority could not understand if they did read.

Take street assessments. Under the Torrens Act all the work under the present law remains the same. In addition the notice of intention must be put on each certificate of each piece of land affected.[30] When one remembers how often a notice of intention is given and the proceedings go no further, the amount of labor under the Torrens Act from this one item will certainly be enormous.

Take tax sales. Again we have the same work as under the present system and in addition certain sections provide for the filing of notice and other proceedings of vesting title.[31]

Take judgments. At present a judgment creditor dockets his judgment in the Recorder's office. It at once becomes a lien on every piece of property in the county owned by the judgment debtor. This is perhaps to a certain extent inconvenient, as it has the effect of clouding the title to land owned by persons with the same name as the judgment debtor. In a short time, however, the judgment is satisfied, or the lien expires by the statute of limitations, so that comparatively few titles are injured and when the question does arise an affidavit of identity satisfies most title insurance companies. Under the Torrens Act each judgment creditor would have to have a search made of the records to find out the property of his judgment debtor. This in itself adds greatly to the work to be done. If in doubt as to whether the property belonged to the debtor the judgment

[30] Cal. Land Title Law, § 94.
[31] Cal. Land Title Law, § 77, et seq.

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would be put on the certificate anyway, as there is no penalty under the act for clouding a title in such a case. No certificate of identity would avail to remove this cloud; a court proceeding would be necessary to take it off the record.[82]

Take leases for more than one year. At present such leases are seldom recorded—about four hundrd a year in the City and County of San Francisco. Neither party to the transaction desires as a rule that the rental and other terms of the lease should be matters of public record. The lessee is fully protected by his possession. All this the Torrens Act changes. Every lessee must record his lease and have an entry thereof on the certificate of title to the land. If this is not done it is perfectly easy to cut off the lessee's rights, no matter how long the term nor how valuable the improvements made by him, unless again the constitution of this state or the United States should intervene.

One could go through the entire list of instruments affecting real property filed in the Recorder's office from Acceptances to Wills. The comparison in each case will show little if any saving and a considerable increase in labor and expense under the Torrens system. In short, if any lawyer will read the Torrens Act carefully, then imagine it in complete operation, and then compare in detail the work that he himself, his clients and other parties affected would have to do in his daily practice under the Torrens System as compared with the present system, it is believed that the comparison will disclose conclusively the superior cheapness and efficiency of the present method. Too often the briefs for the Torrens System simply establish its general constitutionality and general practicability. They do not take up each operation involved in land transfers and analyze the actual work required under each system. Such an analysis, it is confidently believed, will demonstrate that under California conditions the title insurance method is the simplest yet devised, and with a few improvements the most satisfactory. The purchaser or mortgagee puts his instrument on record, and gets his policy of insurance. Many things may thereafter affect the land but they do not divest title except after legal notice. The statute of limitations soon does its work and without judicial proceedings automatically cancels many things affecting the title.

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[82] Cal. Land Title Law, § 98.

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In other words it is simplicity itself to put an interest on record under the recording system; it is almost as simple to take it off. With a minimum of effort the title takes care of itself.[33] The Torrens System registering everything in advance on the certificate to the land, and requiring judicial proceedings for their removal, amendment, etc., does an enormous amount of work which never comes up under the recording system, e. g., mechanics' liens, judgments, etc., are now released or expire by limitations; the land has probably not been transferred in the meantime. The bulk of the work required under the Torrens System has been avoided. The question of cheapness is one on which it is hard to get accurate figures.[34] The statements in the books of proponents of the Torrens System are worthless as they simply give statutory fees, which of course tell nothing. The Torrens Act is a good example of a favorite trick in government accounting. The statutory fees are purposely made very low. Nothing is said as to the amount to be contributed by the tax payer for the highly expert services required of the registrar and his staff and nothing is said as to the work which must be done by the courts and by the attorneys, clients and others interested, all of which must of course be paid for. The only accurate way in which to figure the cost of the system is to determine the work that must be done. If the work is done it must be paid for by someone and no juggling of government accounting can make it otherwise.

From the perfervid arguments of Torrens supporters one would be led to believe that the Torrens solution is ethically and juristically superior to the present system of land transfers, but is this so?

1. Where is the saving in a system under which every mortgagee, encumbrancer, lien holder, runs the risk of his interest

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[33] Report of New York State Bar Association, Vol. 31, 1908, p. 394, Frank E. Hodgins, K. C.: "Whenever, in dealing with the actions of mankind, entire accuracy is demanded, difficulties arise from the careless way in which business is ordinarily done. The rules which endeavor to correct this are, in a busy age, likely to cause friction, trouble and delay. And as between a system which is simple in operation and leaves the title to take care of itself and one which aims at perfection of result, this element may become important enough to prevent the complete acceptance of the latter."

[34] 19 Case and Comment, 742, average cost to establish title one per cent of value of property, minimum fee $150 in New York; 71 Cent. L. J. 30, $1100 for each title in Mass. The cost of the London office has been almost a scandal, Report of New York Bar Association, 1908, Vol. 31, p. 311.

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being disregarded every time the owner sells the property; a system under which the owner himself may have his property taken away by forgeries, tax sales, etc., without his knowledge. An indefeasible title in the purchaser necessarily implies a defeasible title in every other interest.[85]

Sound policy should put the risk on the purchaser where it properly belongs. He can protect himself by insurance. The Torrens System unsettles the titles of the ninety-nine who hold their property for the sake of the one who makes a purchase. Even if it accomplished the security of the purchaser, which as we have seen it does not, the other effects would not be desirable.

2. The Torrens System is designed to eliminate the possibility of adverse possession. Is this just or desirable? It is unnecessary to refer to the fact that long continued possession and enjoyment as a source of title is recognized by almost every civilized nation. Is it not the commonest thing for parties to go into possession under an oral promise and make improvements? Equity recognizes this and enforces the contract specifically. The same is true of the so-called easement by estoppel, where improvements are made on the faith of an oral promise. Instances are by no means infrequent where an owner hands over possession to a relative or friend without any conveyance. In a few years the statute of limitations does its work and the title becomes unimpeachable. Under the Torrens Act the discovery of the duplicate certificate years after would afford the opportunity to destroy long continued possession taken in the best of faith. The tendency of modern jurisprudence is to get away from the rigid enforcement of a rule of law; to recognize that the particular circumstances of a particular case must be considered before the general rule can be applied. The ruthless universality of the Torrens Act gives little opportunity for special circumstances. It substitutes the abstract rule for the concrete case and in so doing conflicts with civilized jurisprudence.

It must also be remembered that the Torrens Act cannot be put into operation at once; it requires many years before it can embrace all the property in the state. In the meantime the people must be subjected to the dangers, expense and inconven-

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[85] 19 Case and Comment, 726. "As already indicated above, the subsequent transfer and certificate, even if valid and conclusive, is not safe. If it is made safe for the purchaser, it may be unsafe for the encumbrancer, and if made safe for all parties, the proceedings become so cumbersome as to be of no benefit at all."

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ience of the dual system. This will become manifest as soon as the Torrens Act goes into any extended use. Deeds, mortgages, judgments, liens, street assessments, contracts, tax sales, all the operations affecting real property must halt until an examination of each piece of land affected has been made to determine whether the ordinary procedure, the Torrens procedure, or both should be adopted. No lawyer will be safe, for example, in merely docketing a judgment against a debtor, or taking out execution in the ordinary way. He must first ascertain whether the land involved or any part of it has been brought under the Torrens Act.

The Torrens Act is made for highly trained people, for lawyers who never make mistakes, clients who carry out transactions with formal accuracy, record their papers promptly, keep them safely, register their addresses on each change and decline to do anything such as taking a lease or possession under a contract without an entry on the record. Under the present system title, as has been said, is let alone, it takes care of itself. Simple recordation or possession protects the interests acquired and the widest scope is given by equity to protect purchasers in good faith. Under the Torrens Act there is a heavy initial expense, each transaction thereafter is more involved and complicated than under the present system, requiring more expert action by officials, the legal profession and the parties concerned. Innumerable questions, constitutional and otherwise, will be presented to the courts for solution[36] and expensive plants with highly trained officials must be provided for; at the same time risks are not eliminated and title insurance is still necessary. The justice of equity is throttled by rigid statute law; for generations the inconvenience of two systems must be endured. For the above considerations it is respectfully submitted that the solution in California is the repeal of the Torrens Law.[37]

A. M. Kidd.

Berkeley, California.

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[36] Niblack, p. 328. An examination of the Australian and Canadian reports shows an increase in Torrens litigation.

[37] In 1916 a uniform Torrens Act was recommended by the American Bar Association. Report of American Bar Association 1916, Vol. 41, pp. 26, 478. The recommendation to that effect should detract from the high regard the profession has paid to the actions of that association. It was supposed to be a truism that uniformity in legislation is not a thing to be sought after under any and all circumstances. Rather in new matters diversity is considered advisable. Under competing systems experience is

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A Brief History of Imperial Roman Canon Law

ON MAY 19, 1918, there went into effect the latest of all the modern Codes, — the new Code of Canon Law of the Catholic Church.[1] This is certainly one of the greatest literary juridical achievements of the 20th century: it is most remarkable that the enormous ecclesiastical jurisprudence of the Roman Church has been condensed and gathered into one small octavo volume of only 448 pages. The new *Codex Juris Canonici* is a true code and like in form to any of the Modern Codes, such as the French Civil Code.

It was Pope Pius X who designed, and initiated in the year 1904, the gigantic task of restating and codifying the vast ecclesiastical jurisprudence of a world-wide church, then scattered in the voluminous 12th-16th century *Corpus Juris Canonici*[2] and

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gained, free growth and development is promoted. In other words, the subject for uniform laws should be matters well established, like bills and notes, where the law is either one way or the other, and it is desirable that it should be uniform.

For experimental matters, such as land transfers, it is highly undesirable that any uniform act should be passed in advance of practical experience. Space does not permit an analysis of the proposed uniform act and its effect in California. But the present California Act was devised with consideration for the present unrepealed local law, although as has been seen it fits very poorly. The uniform act pays no attention to local conditions. Almost every objection made to the California Act may be made to the uniform act and innumerable additional ones, as might be expected from a ready-made statute on a subject affecting almost every department of substantive law and procedure, conveyances, mortgages, easements, trusts, liens, judgments, executions, attachments, administrations, etc., a statute drafted without any detailed study of the system into which it is supposed to fit.

Proponents of the Massachusetts judicial system for example, do not believe any other is practicable. Judge Davis in the report of the New York Bar Association for 1908, at p. 408 says, "I do not believe it would be practicable to have a system which, under our written law must of necessity be a judicial system operate not like the English and provincial acts, purely as a ministerial function, but solely through proceedings in court and by order of a judge after judicial process. I do not believe it would be practicable to have such an act administered, except under the immediate direction of a special court."

[1] *Codex Juris Canonici Pii X Pontificis Maximi jussu digestus, Benedicti Papae XV auctoritate promulgatus. Praefatione, fontium annotatione et indice analytico-alphabetico ab emo. Petro Card. Gasparri auctus,* New York, Kenedy & Sons, 1918. It was promulgated May 27, 1917 (Pentecost) to become operative on Pentecost the year following (May 19, 1918).

[2] Described in detail in Sherman, Roman law in the modern world, vol. i, §§ 226-230.

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the vast number of ecclesiastical enactments since the 16th century. This novel and arduous work of codification lasted 13 years, the main burden being borne by that learned and distinguished Canonist, the present Papal Secretary of State, Cardinal Gasparri, to whom the present Pope, Benedict XV, gave an unusual tribute of praise a few months before he promulgated the new *Codex Juris Canonici*.[3]

This latest 20th century code, most admirable in its succintness, lucid brevity, and orderly intelligibility, is naturally reviving an interest in the jurisprudence of Christianity which had its origin in the period of the Roman Empire, especially from Constantine the Great onward. This is a subject which should perforce interest all modern peoples whether Catholic or Protestant, for the period to be considered is characterized by one undivided Christian Church which has given to modern Europe and America its dominent theology.

For it should never be forgotten that the Canon law was the medium through which the Christian Church aided the preservation of Roman Civil law to modern times. "The laws of Justinian have been woven into the fabric of the Canon law and in that form . . . . obtained the sanction of the Church."[4] For instance, the Roman law of charities has entered the Anglo-American common law via Canon law. It was the first Christian Emperor, Constantine the Great, who in the year 315 A. D. empowered his subjects to bequeath their property to the Church. So freely and frequently was this permission subsequently acted upon, that half a century later Christian churches and religious orders were found to own a vast quantity of property. And with this accumulation came social abuses, so much so that in the year 364 the Emperor Valentinian enacted a mortmain law to prevent accumulation of property by churches and religious corporations. But this restraint soon passed away and a century and a half later in the time of Justinian it became a settled principle of law that legacies for pious or charitable uses should receive special favor in the courts and be regarded as privileged. And wills containing charitable dispositions of property became more liberally construed than other wills: no such legacy or devise was suffered to be lost because the object destined by the testator became uncertain or failed. A legacy to God was

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[3] In the secret consistory of December 4, 1916.
[4] Morey, Roman law, p. 206.

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construed to go to the parish of the testator. And Roman courts might designate the persons entitled to receive the gift. As soon as the use of wills was permitted in England, these and other principles of the Roman law of charities were introduced into the English Common law by the English Chancellors; they, down to the 16th century and the time of Henry VIII, were always ecclesiastics of the Roman Catholic Church and of course educated in the medieval Roman Canon Law which was almost entirely of Roman Civil law origin as to things secular.[5]

Origin of ecclesiastical jurisdiction in the Apostolic Era of the Church. Ecclesiastical jurisdiction means primarily authority exercised by ecclesiastical persons over other ecclesiastics and lay persons. It is not limited to ecclesiastics only. The beginnings of the exercise of spiritual authority over members of the church antedate the conversion of the Empire to Christianity, and go back to the Age of the Apostles.

The very essence of ecclesiastical jurisdiction with its sanction of excommunication can be traced to Christ's own words as recorded in St. Matthew's Gospel:[6]

> "Moreover if thy brother shall trespass against thee, go and tell him his fault between thee and him alone: if he hear thee, thou hast gained thy brother.
>
> "But if he will not hear thee, then take with thee one or two more that in the mouth of two or three witnesses every word may be established.
>
> "And if he shall neglect to hear them, tell it to the church: but if he neglect to hear the church, let him be as an heathen man and a publican.
>
> "Verily I say unto you, Whatsoever ye shall bind on earth shall be bound in heaven: and whatsoever ye shall loose on earth shall be loosed in heaven."

Criminal spiritual jurisdiction was exercised by the Apostles: St. Paul directed that the incestuous Corinthian should be put out of the church,[7] and expelled Hymenaeus and Alexander for blasphemy.[8]

Ecclesiastical jurisdiction as exercised during the Early Roman Empire following the Apostolic Age until the conversion of the Empire to Christianity. After the Apostolic Age, criminal spir-

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[5] Sherman, Roman law in the modern world, vol. i, §§ 379, 229.
[6] Matthew, xviii, 15-18.
[7] 1Corinthians, ch. 5.
[8] 1 Timothy, 20.

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itual jurisdiction was exercised by each bishop over his churches. But St. Ignatius[9] held that this authority should be exercised with the advice of his presbyters. With the coalescing of episcopal dioceses into provinces, and provinces into still larger districts (in imitation of the administrative organization of the Roman Empire) provincial synods of the bishops and other still larger synods acquired a criminal spiritual jurisdiction, — at first original jurisdiction principally over bishops.

In this period began the exercise of appellate jurisdiction as to the clergy and laymen. Although a bishop had no formal right of appeal from the jurisdiction of a synod over him, yet sometimes other bishops would refuse to recognize a synodical sentence of deposition as unjust and would continue to communicate with the bishop as if not sentenced.

In the 3d century St. Cyprian expressed the theory of the church of his age in declaring that the Apostolic power of delegated sovereignty from the Lord, whether judicial or legislative, was held in joint-tenancy by all the Catholic bishops as a body in succession to the Apostles. But gradually a certain preeminence was conceded to bishops occupying sees traditionally founded by Apostles, or sees of great secular importance.

Even before the Edict of Milan made Christianity a lawful religion, the Roman secular courts sometimes had recognized certain indirect temporal consequences of spiritual sentences of deposition from the ministerial office. The famous example is the case of Paul of Samosata, bishop of Antioch, who was deposed and excommunicated in 269 A. D. by a great synod of the district of Antioch. But Paul refused to give up possession of the episcopal residence, notwithstanding his sentence. The Civil courts of the Empire were invoked to enable the local church to recover the see residence. The court wrote to the Emperor Aurelian for a rescript to decide the cause. The Emperor referred the case to the bishop of Rome who decided in favor of the Church of Antioch.

Antiquity and meaning of the terms "Canon" and "Canon law." In the Roman law the term canon signifies a rent or stipend payable at some regular time, generally annual: e. g., *canon frumentarius,* — the wheat tribute from the grain provinces of Rome; the lessees of public lands had to pay a perpetual rent

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[9] Ch. 100.

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or "canon"at some periodical time. All this is quite different from the ecclesiastical import of the word "canon."

In its ecclesiastical sense the term "canon" has a comprehensive and a narrow meaning. (1) The general meaning of the word is "every ecclesiastical statute or regulation."[10] With the formation of Christian congregations, or churches, Ἐκκλησίαι certain rules were agreed upon for their government. The language of the early Christian church was Greek: these rules were known by the Greek term Κάνωνες, or canons. Their Latin synonyms were *canones, forma, disciplina.* Holy Scripture is called "Canon" because it is the supreme rule to govern the Church and the faith and life of Christians. The first eight general or ecumenical councils of the Church call their decisions as to discipline "canons," but their decisions as to faith, "dogmas."[11] The comprehensive terms *canonica sanctio* (canonical sanction), *lex canonica* (a canon law or statute), and *canonum jura* (laws of the canons) were not introduced until the 9th century of the Christian era, nor was the term *jus canonicum* (Canon law) employed until ecclesiastical law began in the 12th century to be treated as a science. The 6th century monk Dionysius the Little (Exiguus) is said to have been the first to give the name *jus* (law) to ecclesiastical regulations; at any rate, the expression *jus canonicum* (Canon law) became generally used from the 12th century onward.

(2) The word "canon" in medieval ecclesiastical law came to have a narrow meaning: the statutes of a bishop, or of a chapter, or the rules of a religious order (such as the Franciscans) are called "canons." And this narrow meaning still lingers in Church of England law. But in the Roman Catholic ecclesiastical law of today the term "canons" is now very largely reserved for (1) laws inserted in the great medieval codification known as the *Corpus Juris Canonici,* and (2) for the apostolic declarations of whatever date concerning a point of faith or discipline, e. g., the Apostolic Canons, the canons of General Councils. All other ecclesiastical law is called by Roman Cath-

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[10] *"Canonum quidem allii sunt statuta counciliorum, allii decreta pontificum aut dicta sanctorum"*; Can. 2, Dist. 3 (*Decretum, Corp. Juris Canonici*).

[11] The last Catholic church council of a general nature (Trent, in 1545), on the contrary, designates under the name of "Canons" its definitions and anathemas, and calls its ordinances on the reformation of discipline "decreta": such is the change of usage since Imperial Roman times.

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olic canonists by special terms, such as *bullae* (bulls), *motus proprii,* decrees, rules of chancelleries.

Influence of the Roman Civil law on early Canon or Ecclesiastical law. There is no doubt "that Roman jurisprudence provided early Christian teachers" from the times of the Apostles themselves in the 1st century "with language and modes of thought by means of which they (these Christian teachers) might give expression to the truths they desired to propagate."[12] Indeed a "knowledge of Roman law is of practical use for purposes of New Testament exegesis. If King James' bishops or the later Revisers had possessed it, fewer texts in the English Bible would have been confused and meaningless."[13] An examination, even hurriedly, of the writings of St. Paul, Tertullian, and other early Christian teachers markedly substantiates the fact that it was Roman jurisprudence which frequently gave them modes of thought and colored their religious and ethical doctrines.

1. *St. Paul.* The only Apostle with a legal training was St. Paul. He was a Roman citizen, when citizenship counted enormously in the Roman world, while his fellow Apostles were only Roman subjects.[14] St. Paul's personifications in his writings are always legal. For instance, he incorporated into the language of theology and devotion the legal metaphor of the Roman adoption: he is the only writer to use this metaphor, so intelligible to the non-Hebrew nations of his time. Again, St. Paul uses the legal metaphor of the Roman heirship (*hereditas*): perhaps the most daring of all the theological conceptions of Paul is that which defines Christian believers as "heirs of God and joint heirs with Christ." Lastly, there is a striking passage in his Epistle to the Galatians which relates to the Roman law of guardianship.

2. *Roman law in the ceremonies and ritual of the Early Christian Church.* The following instances refer to modern church ceremonies which can be traced back in their essential features to the Early Christian church. Without going into details of illustration, the baptismal service of most churches bears unmistakable traces of the influence of Roman juris-

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[12] Ball, St. Paul and Roman Law, p. vii.

[13] Id.

[14] This Republican and Early Imperial distinction is explained in Sherman, Roman law in the modern world, §§ 43, 44, 56, 58.

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prudence. Parts of the office of baptism have been framed upon the pattern of the Roman contract of stipulatio (question and answer) and also on the claim with the rod, in the ceremony of adoption.[15] In the marriage service is encountered the Roman stipulatio or contract formed by question and answer.[16] The Anglican and Protestant Episcopal ordination of priests and the consecration of bishops also reiterate the influence of the Roman stipulatio in the form of these ceremonies.[17]

3. *Tertullian and Lactantius.* Tertullian, one of the fathers of the Church, and who was converted to Christianity in 185 A. D. (five years after the death of the Emperor Marcus Aurelius), was a lawyer, and practiced at Rome. He was a contemporary of the great Roman jurists Papinian, Gaius, Ulpian, and Paulus. Perhaps Tertullian is that "Tertullian" whose fame as a jurist is preserved in Justinian's Digest.[18] The title of one of the ecclesiastical Tertullian's books shows his lawyer-like mind, *De praescriptione haereticum* (notice the technical Roman law term "praescriptio" borrowed by him to substantiate his argument that beliefs which had been in the field since the days of the Apostles were on this account alone entitled to protection "by prescription" against the new-fangled theories of heretics). It was Tertullian who first employed the word "Trinity" to express the Godhead;[19] and, by importing "into the sphere of theology the Roman legal conception of a person as an individual acting in some particular capacity or condition, and also the corollary that a single person might play many parts (personae),"[20] he declared that God, although a unit, might be considered under the several personalities of Father, Son and Holy Spirit. Lactantius, who died in the very year of the famous Nicene Council, reveals his original profession as a lawyer by his principal work, *The Divine Institutes* (notice the title "Institutes", — one hitherto immemorially reserved for beginners' legal text-books of Roman law students): in this work Lactantius "tries to explain the mystic relationship between God

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[15] See Ball, St. Paul and Roman law, pp. 12, 39.
[16] Id., p. 49.
[17] Id.
[18] See Sherman, Roman law in the modern world, vol. i, §§ 106, 118.
[19] Ball, p. 82.
[20] Sherman, Id., vol. i, § 118.

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and Christ on the basis of the Roman law relationship of the paterfamilias and his son in power."[21]

Finally, it is often overlooked that from the latter part of the 3d century onward the leading bishops possessed a previous training in the Roman Civil law. St. Cyprian, St. Ambrose, St. Augustine, St. Paulinus of Nola, and St. John Crysostom had practiced law either as teachers or advocates at the Bar. Furthermore St. Ambrose and St. Paulinus had held high administrative and judicial offices of State.

Conversion of Constantine to Christianity in the year 310 *A. D.* The truth of the celebrated story of the conversion of Constantine by reason of the flaming cross in the heavens, as related by Eusebius, has been greatly doubted by critical historians. That Constantine however was a friend to the Christian church cannot be denied. Naturally he may have been influenced in this direction when a youth, for his mother Helena was a Christian. The character of Constantine does not reveal any evidence of a personal assimilation of the truths of Christianity. He did not become openly a Christian until very late in life, and throughout his life he seems to have adopted a policy of double dealing with the new religion: that is, while favoring Christianity, he also tried to obtain all the benefit possible from the relics of paganism. For instance, "he not only called himself the Bishop of Bishops, and assumed a sort of headship over the Christian clergy, but he also retained to the last the title of Pontifex Maximus, which marked his supremacy over the pagan hierarchy."[22]

The Edict of Milan, — the decree of Roman religious toleration enacted by Constantine the Great in 313 *A. D.* The effect of this statute[23] was to make Christianity a lawful Roman religion: previously the Church had been an illegal society. From the date of the Edict of Milan the Roman Empire, although tolerating other religions, recognized Christianity, the organization of the Christian Church, the decrees of its general and provincial Councils, the jurisdiction of Ecclesiastical Courts, and permitted the Church to enjoy the benefit of property received by gift or bequest.[24]

Christianity becomes the only lawful Roman religion. The

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[21] Id., vol. i, § 119.
[22] Morey, Roman law, p. 144.
[23] Its text is given in Sherman, Roman law in the modern world, vol. i, § 145, footnote.
[24] 11 Laws of Eng., p. 357.

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Emperor Julian, who ascended the throne about 25 years after the death of Constantine the Great in 337, tried to subvert Constantine's work and return to the religion of paganism. For this he has been branded in history as "Julian the Apostate", which is unjust; for Julian — an emperor of marked ability indulged in no Neronian or Diocletian persecution of the Christians, and really adopted the policy of Constantine, only reversed, as to the two religions. Under Jovian, Julian's successor, the policy of Constantine was again adopted, and by the time we reach Theodosius the Great in 379 (16 years after the death of Julian) the pagan religion is completely proscribed and its temples demolished. Theodosius was an ardent believer, and very intolerant of heretics and pagans. Religious toleration was not practiced any more or so much by Christians of this period as under Emperors confessedly pagan.

Supremacy of the Roman State over the Church in the Later Roman Empire. Constantine the Great himself adopted and practised the principle that the Church is subservient to the State, — witness his assembling of the clergy in the famous Council of Nicaea, 325 A. D., to determine and fix the orthodox belief.

His Imperial successors, including Justinian, always maintained the principle of the subjection of the Church to the State. As a legal corporation recognized by Roman law, the Church was regulated by the Emperor. The Imperial legislation of Justinian asserted a majestic superiority over the Church and its Canon law. He begins his Code by formulating an Imperial creed on the Trinity, and by hurling an Imperial anathema against heretics like Nestorius and Apolinarius: he lays down laws for the clergy and regulates their authority; he makes the bishops Imperial officers for certain temporal affairs, e. g., before the bishops, guardians of lunatics swore on the Gospels to administer their trust with fidelity.[25]

Immunities and privileges of the clergy. The priest, as a citizen, was amenable to the law of the State; as a priest, however, he was amenable to the canons of the Church. Lay citizens or magistrates, as Christians, were subject also to the canons of the Church.

(1) Perhaps the earliest immunity of the clergy was to relieve them from the public burdens to which all other

[25] See Sherman, Roman law in the modern world, vol. ii, § 903.

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citizens were subject. These public burdens (munera) included taxes, and personal services to the local community or to the State. (2) Again, very early the Emperors endowed the churches and gave them the legal right to receive legacies.[26] (3) The clergy obtained certain judicial authority. This will be considered separately a little later. (4) Lastly the heathen right of asylum of temples, their sanctity as places of refuge, was conferred upon Christian churches. Wills of Christians, following the pagan practice as to temples, were often deposited for safe-keeping in churches. The pagan right of intercession for condemned persons and criminals was also conferred on the Christian clergy.

Growth of ecclesiastical jurisdiction in the Later Roman Empire from Constantine onward. (1) *Criminal jurisdiction.* The recognition of Christianity by the Roman State, was soon accompanied by a great development in criminal ecclesiastical jurisdiction. The secular power began to support the decrees of the Church. Episcopal and synodal sentences were made effective throughout the Empire.

The Council of Nicaea decreed that any person, whether minister or layman, cut off from communion in one province, should not be admitted as communicant elsewhere. But such excommunicated person sentenced by a bishop was given a right to appeal. And the celebrated trial of St. Athanasius led to extensions of the right to appeal, as formulated by the First Nicene Council.

In the 5th century the great patriarchates were constituted, and these became authorities superior to metropolitan and provincial synods.

Theodosius the Great began the system of bestowing secular criminal authority on ecclesiastical Courts.[27] And by a statute of the Emperor Honorius in 412[28] it was provided that no clergyman should be accused criminally except before the bishop, i. e., clerics were removed from the jurisdiction of the secular courts in criminal cases. The Emperor Justinian, while not depriving a bishop of his jurisdiction to try and punish ecclesiastical offenses,[29] provided that if the offense was a secular crime the clergyman shall be accused

[26] This power was granted by Constantine the Great.

[27] *Cod. Theod., de Episcopis,* 23 (376 A. D.); *Cod. Theod., de Religione,* 1 (399 A. D.); *Cod. Theod., de Episcopis Ecc. et Cler.,* 62 (Constantius, 355).

[28] *Cod. Theod., de Epis. Ecc. et Cler.,* 41.

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before his bishop who may depose him from his ministerial office; and then the competent Civil tribunal may take him and punish him according to the Civil laws.[80]

Books on Canon criminal law appeared as early as the 4th century, — the so-called "Libri poenitentiales". Very curiously the earliest manuals of penance in the Western church appeared in England and Ireland. Those of David in the 4th century, of Archbishop Theodore of Canterbury in the 6th century, and of the Venerable Bede and Egbert of York in the 8th century are works of special mention. These books of penance served as the foundation of the developing criminal branch of Canon law. Books on criminal procedure in ecclesiastical courts, such as the early "Ordines Romani" on ritual and the "Ordines judiciorum," were the forerunners of collections of formulae and precedents for the preparation of formal or official documents, such as the "Liber diurnus" of the 8th century, a Papal collection.

(2) *Civil jurisdiction.* The temporal jurisdiction of the church has also its roots in the New Testament.[81] Originally it was based upon the free and voluntary consent of the parties to accept the arbitration of the bishop.

And Constantine the Great in his epistle to the Numidian bishops decreed that litigants could resort to their bishops, if they preferred the ecclesiastical adjudication to the judgment of the secular courts.[82] In such a case the episcopal judgment was made irreversible and equivalent to that of the Emperor, and the civil authorities were to enforce it. St. Ambrose and St. Augustine spent much time in deciding civil suits.

The Emperor Honorius at the close of the 4th century decreed that the faithful were privileged to resort to their bishops who should act as arbitrators by consent; but that no appeal to the civil courts was to be allowed, and the award of the bishop was to be enforced by the civil authorities.[83] The Emperors Valentinian and Justinian re-affirmed this legislation.

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[80] *Novel,* 83.
[80] *Novel,* 123, Ch. 21.
[81] See Matthew xviii, 15-17 (given supra); 1 Corinthians vi, 1-8, "Dare any of you having a matter against another, go to law before the unjust, and not before the saints?"
[82] *Cod. Theod., Tit. de Episcopis.*
[83] *Cod. Justin.,* 1, 4.

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But when Charlemagne revived the Empire of the West in the beginning of the 9th century, he made it a matter of right for a litigant to transfer his cause from a secular court to an ecclesiastical tribunal. Evidently Charlemagne labored under the mistaken belief that he was following the authority of Constantine and Theodosius.[84]

Comparative jurisprudence greatly developed by law treatises composing Canon and Roman law comparisons. Although the beginnings of the study of comparative jurisprudence were inaugurated by the Roman jurist Gaius in the 3d century of our era,[85] yet to Canon law is largely due the necessary stimulus which led to the development of literature on comparative jurisprudence.

The earliest attempt at sustained comparison with the Roman Civil law is the *Lex Dei* or the *Collatio Mosaicarum et Romanarum legum,* the authorship of which is unknown and which was probably written about the year 390 A. D.[86] Of the baldest description, the comparison is made by simple juxtaposition without any comment by the author. The *Lex Dei* consists of 16 Titles, all but one beginning with "Moyses dicit." The sixteenth begins with the words: "Scriptura divina sic dicit." The short statement of the Mosaic law at the head of each title is followed by a more or less lengthy collection of Roman juristic opinion,—Ulpian, Paulus, Papinian being usually cited.

The Roman and Canon laws are also compared in the post-Justinian or Byzantine Nomocanones. Here the texts of the secular and the ecclesiastical law are compared with or without annotations. These are also post-Justinian sources of Canon law. A good example is the *Nomocanon* of Photius, published about 880 A. D.; in this the compiler contrasts the old secular Roman law of marriage with the changes introduced by the legislation of the Later Empire. Occasionally Photius states also the differences between the secular and the ecclesiastical law.

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[84] 8 Encycl. Britt. (11th ed.) p. 854.
[85] Sherman, Roman law in the modern world, vol. i, § 86.
[86] Id., § 129.

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Matter and Method in the Military Law Course

THE establishment of the Students' Army Training Corps has given rise to many teaching problems. Each subject had had to be overhauled and has had to be taught by a different method. This not only because of the difference in the amount of time allowed, but also because of the discrepancy in the qualities of the students. The old régime has been temporarily revolutionized. The effects of the new régime will be visible upon the old long after educational institutions will have resumed their former leisurely way. The ending of the war, and the disestablishment of the S. A. T. C. will not abolish all the innovations which the Corps has introduced.

I have been giving a course in Military Law to S. A. T. C. men and I am eager to compare notes with other men in the field. The men whom we find in our S. A. T. C. courses vary in age from 18 to 46. They are therefore considerably older than the students we were accustomed to in pre-war times. The men, moreover, are less likely to have come to us directly from the cloistered walls of a college or university. They have had, of course, some school training, and many college and university education. But there is an immediate and striking difference between these and our pre-war students, in that the latter had more book learning than experience of life, and the present students have more experience than book learning. The differences in age, book and life preparation are sufficient to call for a radical change in our method and matter. Add to these reasons the absorbing, compelling reason that results must be produced in a short time and you have the elements of a vital force which ought to transform the classroom — transform it in respect to the students and in respect to the teacher. The teacher must now use powers he had not much call for using before. His experience of life, his power to deal with practical situations, his ability to give the impression of a live wire, will strongly condition his success in class. For these men are alive; indeed, too much alive to satisfy academic requirements. The quiet and leisure of the grove are necessary elements in that wide and deep culture which it is the proud and grand object of the schools to supply. We are not here to develop culture. Our

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business is more immediate and more practical. We must make men capable of dealing with particular subject matters, and make them quickly. However, this does not entirely militate against our endeavoring to make men independent and original in thought and capable of grasping and dealing with a general situation through our inculcation of general principles and through our development of general powers of straight, rapid and vigorous thinking. We must overcome the torpor of their habitual mental life—as distinguished from their practical life—and adopt an interesting, even striking presentation of the subject.

The case method will not do. The time is short, the subject does not easily lend itself to it. To be successful the analytic method must have ample time in which to develop and must be employed in a fitting environment. How many of our students in pre-war times prepared the assignment intelligently? You can do little with a class that has not mastered the cases; and this mastery means a knowledge of the facts and the decisions of each case and in addition an attempt to synthesize the decisions of the assignment. In certain respects we can expect more in this regard from the new than from the old students, and in others we can expect less. The time limit, however, seems to be decisive. You can cover, once you are started on your career after the painful and elaborate preliminary steps, fifteen pages of the Government Manual for Courts-Martial every day. The facts so covered could not be developed by the case method in less than 150 or 200 pages.

A combination of methods seems to be the best. The case method may be used, but the hypothetical instance is given by the instructor in class. This is rapid and clear and interesting. You are not depending upon the vague possibility that the assignment will have been covered—barracks life is not conducive to reading; you are causing the students to use their minds since all co-operate in the endeavor to seek a solution. A text is assigned for preparation, and a discussion of that text is had in class. This discussion consists of questions on the text, and questions arising out of the text. Elaboration of obscure or difficult points, and a summary of the discussion of the instructor in which he recapitulates the points, expounds the principles and interprets their meaning, completes the lesson. This lesson is not, however, a purely legal one. The dryness of the ordinary course in the law school is proverbial among students. Instruc-

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tors are the only ones who have not found that out. Or, if they have, they are not willing or capable of remedying the condition. Any one who has studied abroad knows that principles count and that these principles are the outcome not only of purely technical legal discussion but of a philosophic view of the subject of law. Criminal law, for instance, is not only a bare discussion of crimes and the procedure to punish them; but it is more: a probing into the sources of things, a delving into the reasons for the principles involved. We cannot go to this undefiled source until we have employed not only the crude instruments of law as we teach it but have risen higher into the sociological and philosophic realms and utilized the results of sociology, of political science, and of philosophy.

This is the opportunity of the instructor. He now has good material to work with. There are two methods of philosophic presentation: that which deals predominantly with matter which may be got from wide reading, and that which deals predominantly with matter which may be got from a wide experience of life. Not only the bald legal, technical reasons for things may now be given, but we may dive deep and soar high into domains which make the study of law not only a practical and useful subject but one which is fascinating and enduring as well.

The fact that the Government has been delayed in furnishing the Manual we were to use has not had altogether bad results. "*Tutti i male non vengono per nuocere*". ('Tis an ill wind that blows no good.) Lectures were in disfavor, and we have had to adapt ourselves to a situation in which the student body was as I have described. At the outset we could have made three grand divisions of students: Those who had come to us directly from high schools, those who had come to us from colleges either immediately or remotely in time, and those who had had either high school or college education and were now well advanced in the high adventure of life. This class would have included all the rest. The method and matter would have differed in each case. But in the rush the segregation was not possible. Our problem then, since we had to take all the classes together was the problem of presenting averages. The public speaker meets the test of a mixed audience. We have had to confront the same task as he—that of appealing to all though each has had widely varying experiences from the others.

Academic life plays a much larger part—two-thirds—than

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strictly military life in the S. A. T. C. The problem of the reconciliation of the academic and the military presents itself. But, though the problem be acute and important, the reconciliation is not impossible. The object of the classroom is to form independent thinkers; the object of the drill field is to make automatons. It does seem ridiculous, from one aspect, to develop the side of mind which is to be completely subordinated in another field of operation. But the compartments may be kept separate. For the purpose of military efficiency he endeavors to forward team work; for the purpose of academic power he endeavors to cherish independence of thought. He subordinates and even suppresses himself in one case, and protrudes himself in the other. We must, therefore, at all costs strive to educe the latent original power of our students, and nurture those capacities which we already find to hand.

So much for method and the problems of the S. A. T. C. The matter of the course has been partly conditioned by the delay in the text books. Some of us have even had to beat time. The Government lately has gone so far as to recommend the suspension of the military course pertaining to Courts-Martial and the Laws of War, and devote the time of that course to the Army Regulations, which were to be taught by Military officers and to recommend this suspension on the ground that nothing of value could be accomplished without the textbook.

I shall indicate in the following pages the ground I traversed before taking up the Government Manual.

Lessons I. and II. (Lectures).

1. Importance of the subject for S. A. T. C. men.
   a. Importance for all officers.
   b. Importance for Judge Advocates.
   c. Importance for Court-Martial officers.
2. Definition of Military Law. Divisions—Substantive law and procedure.
   (1) Procedure.
      a. Procedure previous to trial. General remarks.
      b. Procedure at trial (Evidence).
      c. Procedure after trial (Supervisory authority).
   (2) Crimes. Definitions of crime, proof of and punishment for crime included in this subject.
   Articles of War. What they are. The Divisions. Comparison with civil criminal law.

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(3) Martial law.

(4) Laws of War.

The importance of a strict adherence to international laws of war, and to laws of humanity. Robert E. Lee as the type of fair and humane warrior. Compare with the Germans in this war, and condemn practices against humanity.

(5) Military Government. Law of Occupation of conquered territory.

(6) Comparative Military Law.

Comparison of procedure of Courts Martial and of substantive law of military crimes of France and of America.

3. Distinctions between Military Law and Army Regulations and herein of the difference between disciplinary and administrative measures.

4. Distinctions between Military Law and Customs of the Service. Military law written, Customs unwritten.

5. Division of labor. Lessons to be given on the following branches the indicated number of times:

Procedure	9
Penal Law	6
Forms	5
Martial Law	1
Military Government	2
International Law of War	2
Comparative Military law	1

6. General principle dominating the Army. The subordination of military to civil power.

a. President Wilson in his note to Germany in October, pointing out that the civil power was subordinate to the military in that country and that we could not deal with such a government.

b. The history of the doctrine. Its application.

c. The Roman Republic and the Roman Empire. The subordination in the former of the military authority and the boast of the Romans that the majestic

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toga of the civil officer had greater respect paid to it than the military cloak of the tribune.

d. Example from recent happenings in an allied country. Prime Minister Lloyd George and General Maurice. The dismissal of Maurice the triumph of the civil power over the military.

III. *Recitation.* Facts and principles brought out by question and answer, by discussion, and by summary exposition and interpretation by the instructor. The following lessons were conducted in the same way.

The Concept of Law.

1. What it is.
2. In science.
3. In morals.
4. In law.
5. Distinguishing characteristics of law in all these cases:
   (1) a norm, rule of universal application;
   (2) a penalty attached to the breach of it.
6. In what respects do the sanctions differ in these three cases.

IV. *Criminal Law.*

1. The divisions of law.
2. The place of criminal law in the legal system.
3. The place of military law in that system.
4. What is criminal law. The difference between public and private wrongs. The basis for different procedure and different sanctions. Case of contract contrasted with that of assault. All the elements in which the cases differ brought out.

V. *History of Public Wrongs.*

1. Substantive Law.
   (1) Primitive communities.
   (2) Development, in England especially. The stages:
      a. The law of tooth and fang. Private warfare and vengeance.
      b. Compensation. The stepping in of the state to protect individuals and through them the group. Sociological and practical reasons for the process.

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2. Procedure.
   (1) Trials.
      (a) Early form of. Wager of battle, ordeals by fire and water. Later forms of trial.
   (2) The relation between prosecution and trial.
      (a) The private form of prosecution, beginning with the time when men took the law into their own hands, continuing through the time when crime became a public matter, and maintaining its existence even where the law of crime as a public wrong is highly developed, e. g., in England, where prosecution is to a certain extent private.
      (b) Comparison with American public prosecutions. Fully public as the wrong public.
      (c) Comparison with France. Private prosecution in addition to public. The private prosecutor has a voice in prosecution at trial, while in England he has not, though a private prosecutor exists.
3. Courts-martial.
   (1) Comparison with and application to courts-martial.
   (2) The divisions here; and the functions of prosecution.
   (3) Substantive and Procedural law.
   (4) History of Military Law in America.

VI. *Criminal Intent.*
1. In general.
2. Specific intent.
3. General intent. Intent to commit felony and murder takes place. No specific intent to murder.
4. No intent. Responsibility based upon negligence. Development of this form of criminal responsibility. Upon what is it based—sociological and philosophical considerations.
5. Cases.
   (1) Assault with intent to commit it. Individual in full possession of faculties.
   (2) Insanity. Can an insane person be held responsible? Guilty, not guilty, guilty but insane.
   (3) Intention to do an act, knowing the state of a man. Members of S. A. T. C. inoculated and the alleged criminal knows they were, and heedlessly injures arm of one of these. Is he guilty? Two ques-

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tions: (1) Whether knowledge is sufficient; a question of law; (2) Question of fact: Whether the effects of violence were reasonably to be anticipated.

4. Intention to do an act, not knowing the state of a person. Injury to arm; is there guilt here? Should alleged criminal have known condition of S. A. T. C. man's arm?
   The place of imprudence, recklessness, heedlessness, and negligence in Criminal Law.
5. Drunkenness.
6. Application of the doctrines of specific and general intent and of responsibility with no intent.
   (It is to be noted that the cases are given first in succession. Each one is discussed singly and in relation to the others. By the inductive process the principles applicable in each case are educed and elucidated.)

VII. *Sources of Military Law and Relations Between Federal Courts and Courts-Martial.*

1. Sources of Federal Courts. Constitution provides for Supreme Court, and gives Congress authority to provide for inferior courts.
2. Sources of military courts in constitutional provisions:
   (1) Amendment V to Constitution.
   (2) Authority given to President as Commander in Chief.
   (3) Powers of Congress. Art. 1, Sec. 7.

Congress—source of authority for federal courts (except Supreme Court) and for Military Courts.

4. Limitations on Federal power.
   (1) Can Congress provide for any procedure of Military Court, or for any punishment? Cf. powers with regard to ordinary laws.
   (2) The limitations upon Congress by the Constitution.
   (3) The doctrine of unconstitutionality.
      (a) The departments of government; their functions.
      (b) The Federal Courts. The interpretative powers.
      (c) The origin of the doctrine (a) Marbury v. Madison, (b) the authority of reason.

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5. Relation between Federal Courts and Courts-Martial.
   (1) First contact between Federal Court and Court-Martial.
      (a) Court-Martial not supreme, but may be called to account by Federal Court for lack of jurisdiction by writ of habeas corpus.
      (b) What habeas corpus is. Its origin; its use.
   (2) Second contact. Unconstitutional acts of Courts-Martial may be reversed and annulled by Federal Courts. The stream can rise no higher than its source. The source of Courts-Martial being Congress, the unconstitutional action of Congress cannot free the Court-Martial of constitutional limitations.*

Robert Ferrari.

New York City.

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* "For the practical work of procedure a mock court-martial was prepared. The plot was invented, the characters were cast, and the testimony was in part presented. Rumors of demobilization prevented further progress. But this method was the best, it seems to me, by which, in the absence of text-books, information could be communicated. Even with a text-book the subject matter, as law teachers who have taken up the course this term will testify, is obscure to the students—and to the instructor! The trial makes the procedure interesting, concrete, clear, vivid and enduring. Indeed, it is probably the sole method of communicating the knowledge at all. During the trial the comparative features of military law are steadily kept in view, and similarities with and differences from the French procedure are pointed out. I attended a great many courts-martial in France in 1916-1917, and had this invaluable advantage."

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Comment on Recent Cases

ACT OF GOD: WHAT CONSTITUTES.—In the case of *Newman v. The City of Alhambra*,[1] the chief plea of the defendant was that the damage had been occasioned by an act of God. The plaintiffs owned a lot abutting on one of the defendant city's streets where they had graded to a level higher than the curb. The City of Alhambra later raised the grade of the street twenty-two inches and so altered the method of drainage at the point that when the heavy rains of 1914 came they flooded and injured the plaintiff's property. The Supreme Court refused to admit the defendant's contention that the damage was caused by an act of God, holding that the "owner of property who by unwarranted physical means provides for a change in the drainage of his land so that another must thereby suffer injury may not attribute the logical consequences of his engineering to an act of God."

Mr. Justice Melvin in defining an act of God follows an early California case[2] and quotes from Lord Mansfield who considered an act of God "to mean something in opposition to the act of man; . . . . such acts as could not happen by the intervention of man, as storms, lightnings, and tempests."[3]

This definition has probably been the basis of most subsequent decisions on the question. Certainly it has been consistently followed in California. The leading case of Polack v. Pioche[4] sets forth the proposition that if any human agency intervenes the accident cannot be termed an act of God. It does not matter whether the human agency is that of the defendant or of others, or even of totally unknown persons. In that case waters of a reservoir were loosed by persons unknown; the defendant had not the slightest part in causing the damage and yet the intervention of the human element prevented his defense on the plea of an act of God.

So where a ditch owner had allowed the ditch partially to fill with sand he cut himself off from a defense that would otherwise have been his when extraordinary spring rains caused it to overflow.[5] And similarly where wheat stored in a warehouse was burned by a fire of incendiary origin.[6]

Nor is any fire an act of God, unless indeed, it be started by lightning. Defective electric wiring, faulty flues, spontaneous combustion—all such causes connote the intervention, either by

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[1] (Sept. 27, 1918), 56 Cal. Dec. 309.
[2] Polack v. Pioche (1868), 35 Cal. 416, 95 Am. Dec. 115.
[3] Forward v. Pittard, 1 T. R. 27.
[4] Supra, n. 2.
[5] Chidester v. The Consolidated Ditch Co. (1881), 59 Cal. 197.
[6] Pope v. Farmers' Union & Milling Co. (1900), 130 Cal. 139, 62 Pac. 384, 53 L. R. A. 673.

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omission or commission, of some human agency and so fall outside the rule.[7]

But even though the accident occur by reason of some entirely extra-human force it is not an act of God if such force is not a "sudden unlooked-for physical event against which no prudence could guard." Thus a ship owner who knew the tide must go out yet moored his vessel so close to the bank that it was penetrated by an unknown submerged object when the stream lowered was held not to be protected by a plea of an act of God.[8] And a rain, even though very heavy, in the last days of October "is not such an extraordinary event as will constitute an act of God."[9] On the same reasoning a high wind, in no way resembling a hurricane, and of fairly frequent occurrence in the region at the time of the year is no act of God.[10] Floods of not unprecedented severity, that have been equaled "many a time before" and high waters of seasonal frequency are also without the definition.[11]

The Civil Code of California defines an Act of God as any "irresistible superhuman cause",[12] and in view of the decisions cited we must understand that the cause must not only be "irresistible" and "superhuman" but also unforseeable, at least to such an extent that no prevention was possible.

Many courts have made the assertion that an act of God is an "inevitable" or "unavoidable" accident. Such is not an accurate statement, for the two are by no means synonymous. Truly an act of God is always an "inevitable", as well as an "unavoidable" accident, but not all "inevitable or unavoidable" accidents are acts of God. Thus "damage done by lightning is an inevitable accident, and also an act of God, but the collision of two vessels in the dark is an inevitable accident but not an act of God."[13]

There are many concrete examples of what will fall within the limits of a proper definition; most of them are the natural convulsions of nature operating in an extraordinary and unforeseeable manner. The decisions include droughts,[14] earthquakes,[15]

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[7] Fay v. The Pacific Improvement Co. (1892), 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 27 Am. St. Rep. 198, 16 L. R. A. 188.

[8] Bohannan v. Hammond (1871), 42 Cal. 227.

[9] Remy v. Olds (1893), 4 Cal. Unrep. 240, 245, 34 Pac. 216.

[10] Holt Manufacturing Co. v. Thornton (1902), 136 Cal. 232, 68 Pac. 708.

[11] Ryan v. Rogers (1892), 96 Cal. 349, 31 Pac. 244; Garrett v. Beers (1916), 97 Kans. 255, 155 Pac. 2, L. R. A. 1916 F, 1289.

[12] §§ 1511, 2194.

[13] Fergusson v. Brent (1857), 12 Md. 9, 71 Am. Dec. 583.

[14] Ward v. Vance (1880), 93 Pa. St. 499.

[15] Slater v. S. C. R. Co. (1888), 29 S. C. 96, 6 S. E. 936.

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floods,[16] freezing,[17] lightning,[18] storms,[19] winds,[20] striking an unknown sunken rock in navigating,[21] sudden failure of wind.[22] Death[23] and illness[24] are also held to be acts of God although there is a minority contrary view as to illness.[25] Blight of a potato crop has been held to be within the list in England.[26]

Definitions, and particularly legal definitions, present infinite difficulties. However if we define an act of God as any unpreventable accident occasioned by an irresistible superhuman force alone, we shall not be far wrong. Yet there are cases which do not exactly fit such requirements and yet have properly been held to be acts of God. Thus the case of a jettison at sea in order to save the lives of a ship's crew presents an illustration of an act of God; even though the loss was "accomplished by the immediate agency of man."[27]

But it has been held that a loss occasioned by the closing of schools in consequence of a virulent contagious disease was not due to an act of God.[28] It would seem that it might properly be decided otherwise. It is true the very act of closing the schools came about by human agency but it was the logical consequence of an unpreventable, irresistible, superhuman force and so seems analogous to the case of goods jettisoned at sea.

C. J. S.

CONFLICT OF LAWS: SITUS OF SHARES OF CORPORATE STOCK FOR PURPOSES OF TAXATION.—Shares of stock in private corporations are intangible personal property, in the nature of choses in action.[1] In determining their *situs* for taxation, therefore, they are governed by much the same rules as bonds, mortgages, promissory notes and similar property. There are, of course, obvious differences between these different types, and authority is not unanimous in announcing just what variety of incorporeal personal property stock is. It has been held by some courts to be an

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[16] Long v. Pa. R. Co. 147 Pa. St. 343, 23 Atl. 459, 30 Am. St. Rep. 732, 14 L. R. A. 741.
[17] Vail v. Pac. R. (1876), 63 Mo. 230.
[18] Quincy Gas & Elec. Co. v. Schmitt (1906), 123 Ill. A. 647; McCormick v. Pa. R. R. Co. (1880), 80 N. Y. 353.
[19] Black v. Chicago etc. R. Co. (1890), 30 Nebr. 197, 46 N. W. 428.
[20] Blythe v. Denver etc. R. Co. (1891), 15 Colo. 333, 25 Pac. 702, 22 Am. St. Rep. 403, 11 L. R. A. 615.
[21] Williams v. Grant (1816), 1 Conn. 487, 7 Am. Dec. 235.
[22] Colt v. McMechen (1810), 6 Johns. (N. Y.) 160, 5 Am. Dec. 200.
[23] Ringeman v. State (1903), 136 Ala. 131, 34 So. 351.
[24] Dickey v. Linscott (1841), 20 Me. 453, 66 Am. Dec. 66.
[25] Supra, n. 23.
[26] Howell v. Coupland (1874), L. R. 9 Q. B. 462, 466.
[27] Story, Bailments, § 525; Gillett v. Ellis (1850), 11 Ill. 579.
[28] Gear v. Gray (1894), 10 Ind. App. 428, 37 N. E. 1059.

[1] Jellenik v. Huron Copper Mining Co. (1899), 177 U. S. 1, 12, 44 L. Ed. 647, 20 Sup. Ct. Rep. 559; Hutchins v. President etc. State Bank (1847), 12 Met. 421, 426; Webb v. Baltimore & Eastern Shore Ry. Co.

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equitable interest in the property of the corporation,[2] while others repudiate this view.[3] The definition which seems best to describe its true nature is that it is the interest of the shareholder in the company, measured by a sum of money, for the purpose of fixing his interest and liability, though it is not a sum of money but a contract consisting of the various rights and liabilities contained in that contract.[4] But which ever of these views the courts take they are unanimous in declaring it to be intangible personal property.

The certificate of stock and the stock itself are entirely distinct things. The former is simply the written evidence of the ownership of the stock.[5]. These certificates have, however, acquired some attributes of property. They may be converted.[6] They are capable of larceny and embezzlement.[7] They may be hypothecated and pledged and be the subject of an action of replevin.[8] By custom in the business world they have come to be regarded as the stock itself.[9] But it is clear that they are not such. The stock may exist and be owned where no certificate has ever been issued,[10] and for purposes of taxation the certificates are not capable of a *situs* where they happen to be found.[11] It is the stock that is to be taxed and its *situs* is dependent on considerations other than that of the location of the certificate.[12]

In dealing with this intangible interest there is no question

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(1893) 77 Md. 92, 26, Atl. 113, 39 Am. St. Rep. 396; Lipscomb v. Condon (1904), 56 W. Va. 416, 49 S. E. 392, 67 L. R. A. 670, 107 Am. St. Rep. 938; Gorman-Wright Co. v. Wright (1904) 134 Fed. 363, 365; Johnson v. Hume (1906) 138 Ala. 564, 36 So. 421; Mattingley v. Roach (1890) 84 Cal. 207, 23 Pac. 1117; Colonial Bank v. Whinney [1886], 11 A. C. 426.

[2] Bridgman Jr. v. City of Keokuk (1887), 72 Iowa 42, 33 N. W. 355. A line of California decisions from Burke v. Badlam (1881), 57 Cal. 594, to Chesebrough v. City and County of San Francisco (1908), 153 Cal. 559, 96 Pac. 288, decided under the California State Constitution, Art. XIII, § 1, support this view. But since the amendment to Art. XIII, § 1 in 1910, and the case of Bank of California National Association v. Roberts (1916), 173 Cal. 398, 160 Pac. 225, some doubt is thrown on the theory of the former decisions.

[3] Commonwealth ex rel. Attorney General v. New York, L. E. and W. Ry. Co. (1890), 132 Pa. 591, 19 Atl. 291, 7 L. R. A. 634.

[4] Borland's Trustee v. Steel Bros. & Co. Ltd. [1901] 1 Ch. 279.

[5] Merrit v. American Steel Barge Co. (1897), 79 Fed. 228, 235; Kennedy v. Hodges (1913), 215 Mass. 112, 102 N. E. 432.

[6] McAllister v. Kuhn (1877), 96 U. S. 87, 24 L. Ed. 615.

[7] O'Herron v. Gray (1897), 168 Mass. 573, 47 N. E. 429.

[8] Kennedy v. Hodges, supra, n. 5.

[9] Simpson v. Jersey City Contracting Co. (1900), 165 N. Y. 193, 197, 198, 58 N. E. 896; Merritt v. American Steel Barge Co., supra, n. 5; New York ex rel. Hatch v. Reardon (1907), 204 U. S. 152, 161, 51 L. Ed. 415, 27 Sup. Ct. Rep. 188.

[10] Pacific National Bank v. Eaton (1890), 141 U. S. 227, 35 L. Ed. 702, 11 Sup. Ct. Rep. 984.

[11] Kennedy v. Hodges, supra, n. 5.

[12] Stanford v. San Francisco (1900), 131 Cal. 34, 63 Pac. 145; Estate of Fair (1900), 128 Cal. 607, 61 Pac. 184; Estate of McCahill (1915), 171 Cal. 482, 153 Pac. 930.

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of physical *situs*, and the well established fact that tangible personal property may have a *situs* different from that of the residence of the owner[13] does not apply.[14] The rule which must be followed then is found in the maxim *mobilia sequuntur personam*, and the state in which the owner of the stock resides is the state which may tax it.[15] But the state which created the corporation may also tax its stock whether owned by residents or non-residents.[16] The power of either of these jurisdictions to tax the stock is not affected by the fact that the other has taxed it.[17] There is no inhibition in the federal constitution against two states taxing the same thing if each has proper jurisdiction over that which it seeks to tax.[18] Taxation of the corporate property in another jurisdiction does not prevent the state in which the owner resides from taxing his stock,[19] and there is nothing in the federal constitution preventing the taxation of corporate property and its stock in the same jurisdiction.[20]

There is one possible exception to the rule that stock may be taxed only at the owner's domicile or in the state creating the corporation. Mortgages, notes and similar choses in action, may, when permanently located in a state other than that of the owner's domicile and employed there by an agent in carrying on the owner's business, acquire a *situs* for taxation in that state.[21] It is necessary for this purpose that they be employed in business there. Mere deposit in another state of the evidences of such intangible property does not subject it to taxation by

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[13] The leading case expounding this rule is Union Refrigerator Transit Co. v. Kentucky (1905), 199 U. S. 194, 50 L. Ed. 150, 26 Sup. Ct. Rep. 36.

[14] Hawley v. City of Malden (1914), 232 U. S. 1, 58 L. Ed. 477, 34 Sup. Ct. Rep. 201.

[15] State v. Bentley (1852), 23 N. J. Law 532; Appeal Tax Court of Baltimore City v. Gill (1878), 50 Md. 377, 396; Jennings v. Commonwealth (1900), 98 Va. 80, 34 S. E. 981; State v. Nelson (1909), 107 Minn. 319, 119 N. W. 1058; In re Greenleaf (1900), 184 Ill. 226, 56 N. E. 295, 77 Am. St. Rep. 168.

[16] Canfield v. County of Los Angeles (1910), 157 Cal. 617, 108 Pac. 705; Hawley v. City of Malden, supra, n. 14; Corry v. Baltimore (1905), 196 U. S. 466, 49 L. Ed. 556, 25 Sup. Ct. Rep. 297.

[17] Kidd v. Alabama (1903), 188 U. S. 730, 47 L. Ed. 669, 23 Sup. Ct. Rep. 401; Bellows Falls Power Co. v. Commonwealth (1915), 222 Mass. 51, 109 N. E. 891; Seward v. The City of Rising Sun (1881), 79 Ind. 351.

[18] Supra, n. 14.

[19] City and County of San Francisco v. Fry (1883), 63 Cal. 470; Chesebrough v. City and County of San Francisco, supra, n. 2.

[20] Bank of California National Association v. Roberts, supra, n. 2; Owensboro National Bank v. Owensboro (1898), 173 U. S. 664, 677, 43 L. Ed. 850, 19 Sup. Ct. Rep. 537.

[21] Catlin v. Hull (1849), 21 Vt. 150; Goldgart v. People ex. rel. Goar (1883), 106 Ill. 25; People ex rel. Jefferson v. Smith (1882), 88 N. Y. 577; People v. Home Ins. Co. (1886), 29 Cal. 534; New Orleans v. Stempel (1889), 175 U. S. 309, 44 L. Ed. 174, 20 Sup. Ct. Rep. 110; State Board of Assessors v. Comptoir National D'Escompte (1903), 191 U. S. 388, 48 L. Ed. 232, 24 Sup. Ct. Rep. 109.

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that state.[22] It is doubtful whether from its nature stock could be so employed, but if such a case should arise, there would seem to be no good reason why the same rule should not be applied to it, as to other property of a similar nature.

Jurisdiction to levy inheritance, transfer and succession taxes is not dependent on the same facts as jurisdiction to levy a tax on the property as such. The former are not taxes on the property itself but upon its transfer, and the right to levy such tax exists only when the exercise of some essential incident in the transfer of title depends for its legality upon the law of the state levying the tax.[23] Location of the property is not considered. It will, however, generally be the state which has jurisdiction to levy the property tax which may also levy the inheritance tax, where stock is concerned. Thus the state creating the corporation may levy such tax,[24] as may also the state where the owner is domiciled.[25] A state may not levy such tax merely because the corporation happens to own property in it,[26] nor is such tax valid simply because the certificates of stock are deposited within it for safe keeping where the corporation is not created by that state, nor the owner domiciled therein.[27] This, however, does not in the slightest degree affect the validity of the rule that the two kinds of taxes are fundamentally different and that jurisdiction to levy them is dependent on different considerations.

In *Lowry v. County of Los Angeles*,[28] the court held that stock of an Illinois corporation, held by trustees in Illinois, the beneficial interest of which was in a resident of California, was not taxable in this state. No inheritance or succession tax was involved. Decisions in the various states differ as to whether the cestui of incorporeal property can be taxed for it where the trustee is a non-resident. Some courts clearly hold that he can[29] while others hold that it is assessable to the trustee.[30] This

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[22] Buck v. Beach (1907), 206 U. S. 392, 51 L. Ed. 106, 27 Sup. Ct. Rep. 712.

[23] Welch v. Burrill (1916), 223 Mass. 87, 111 N. E. 774; In re Hulls Estate (1906), 97 N. Y. Supp. 701; Knowlton v. Moore (1900), 178 U. S. 41, 44 L. Ed. 969, 20 Sup. Ct. Rep. 747; Blackstone v. Miller (1903), 188 U. S. 189, 47 L. Ed. 439, 23 Sup. Ct. Rep. 277.

[24] Welch v. Burrill, supra, n. 23; In re Bronson (1896), 150 N. Y. 1, 44 N. E. 707.

[25] Frothingham v. Shaw (1899), 175 Mass. 59, 55 N. E. 623.

[26] Welch v. Burrill, supra, n. 23.

[27] People v. Griffith (1910), 245 Ill. 532, 92 N. E. 313; In re Enston (1889), 113 N. Y. 174, 21 N. E. 87, 3 L. R. A. 464; In re Jones Estate (1894), 144 N. Y. 6, 38 N. E. 961.

[28] (1918), 27 Cal. App. Dec. 307.

[29] Seldon v. Brooke (1906), 104 Va. 832, 52 S. E. 632; Wise v. Commonwealth (1918), 95 S. E. 632 (Va.); Central of Georgia Ry. Co. v. Wright (1908), 166 Fed. 153; Georgia Railway and Banking Co. v. Wright (1916), 237 Fed. 478; Hunt v. Perry (1896), 165 Mass. 287, 43 N. E. 103; Hathaway v. Fish (1866), 13 Allen 267.

[30] Price v. Hunter (1888), 34 Fed. 355; City of Detroit v. Lewis (1896), 109 Mich. 155, 66 N. W. 958, 32 L. R. A. 439; Latrobe v. Baltimore (1862), 19 Md. 13; State v. Matthews (1859), 10 Ohio St. 431.

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does not indicate a difference in the principles applied by the different courts, however, because the decisions invariably turn on the provisions of the local statute, and courts in the same state change their decisions as the local law changes.[31] There seems to be no question that the state of the cestui's domicile has jurisdiction and may tax him on the stock held in trust if it sees fit. This is in accord with the general rule in regard to such property. The cestui is the beneficial owner, he has a property interest which to all practical effects is the stock itself, that property interest is located where he is, and that is what gives jurisdiction to tax. At the same time the trustee being legal owner may be taxed at his domicile on the same stock.

The principal case declares that to tax the stock both in Illinois and California would be double taxation. This can have no weight whatever in determining jurisdiction to tax. Double taxation does not legally exist unless in the same jurisdiction. If a state has the power to tax, that power is in no way affected by the fact that some other state may tax the property. It may however affect the interpretation of the local law and it is only equitable that two states should not tax the same property unless their statutes require it.

It is difficult to ascertain from the decision in the principal case whether it is based on an interpretation of California law on this subject, or whether it lays down the broad principle that a cestui resident in this state cannot be taxed here for stock held by a non-resident trustee. If it turns on the former it may doubtless be justified, but if it denies the power of the state to tax the cestui for such stock it is out of harmony with the general rules of law in this country.

P. S. M.

CONSTITUTIONAL LAW: EFFECT OF CONTRACTS FIXING RATES ON STATE'S POWER TO DEFINE AND REGULATE PUBLIC UTILITIES: WATER CONTRACTS.—The peculiar doctrine of the California Supreme Court to the effect that no business can become a public calling until the owner makes a "dedication"[1] of his business to the public would, it seems, assume that the owner could make the so-called "dedication" whenever he desires. However, in the case of *Allen v. Railroad Commissioners*,[2] while conceding that the owner "did all that lay in his power to declare the company to be a public service corporation", the court held that it was impossible for him to make a "dedication" because he had sold

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[31] Dorr v. Boston (1856), 6 Gray 131, cestui held not taxable under statute then in force. Commented on in Bemis v. Boston (1866), 14 Allen 366, as being no longer the law and overruled in Hunt v. Perry, supra, n. 29.

[1] See note on this phase of the law on another page of this Review.
[2] (Oct. 1, 1918) 56 Cal. Dec. 356.

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water certificates and contracted to sell water to certain consumers at a given price; that these agreements were property rights in the hands of the consumers which would be taken in violation of the fourteenth amendment if the company were permitted to make the desired "dedication". This was a case involving contracts between an irrigation company and its consumers which, as will be pointed out later, may have influenced the court to treat it as peculiar, yet the broad proposition of whether a state's power to regulate public utilities is abridged by the making of contracts fixing rates and conditions of service before the state actually undertakes to fix rates is surely presented. Is it possible that the exercise of the police power of the state, under which it defines and regulates public utilities, may be anticipated and made powerless by the device of making contracts?

There are some points in this connection that are well settled. To begin with, if the business in question was at the time of making the contract of the kind conceded to be a public utility by virtue of a statute then in existence, there is no doubt but that all authorities would agree that the making of the contract could not retrench the state's power of regulation,[3] for the power of the state to regulate prices and services then becomes an implied part of every contract, although the state may not actually have fixed a rate. The California court accepts this principle which accords with the Civil Code.[4] A more doubtful case is presented, however, where long period contracts have been entered into before the passage of a public utilities law. In such situations also the great majority of the commissions and courts uphold regulations and rates at variance with the established agreement,[5] particularly where there is a constitutional

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[3] Note, 32 Harvard Law Review, 74, Nov., 1918; Kansas City Bolt and Nut Co. v. Kansas City Light & Power Co. (Mo., 1918), 204 S. W. 1074; State ex. rel. City of Sedalia v. Pub. Ser. Com. of Mo. (Mo., 1918), 204 S. W. 497; McCook Irr. etc. Co. v. Burtless (1915), 99 Nebr. 250, 152 N. W. 334; Salt Lake City v. Utah Light & Traction Co. (1918), Utah, 173 Pac. 556, P. U. R. 1918 F, 377; Farmers & Merchants Telephone Co. v. Boswell Telephone Co. (1918), 119 N. E. 513, P. U. R. 1918 E, 172, 179 (Ind.); Collingswood Sewerage Co. v. Borough of Collingswood (1918), 102 Atl. 901 (N. J.); Hite v. Cincinnati I. & W. R. Co. (1918), 283 Ill. 297, 119 N. E. 904.

[4] Pinney & Boyle v. Los Angeles Gas & Electric Co. (1914), 168 Cal. 12, 141 Pac. 620, L. R. A. 1915 C, 282, Ann. Cas. 1915 D, 471. The court there said, ". . . . it will be conclusively presumed that the parties contracted in contemplation of the power of the proper board or tribunal to fix rates in every case where such power exists and may have been thereafter legally exercised."

§ 3513, Cal. Civ. Code, reads: "Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement."

[5] Raymond Lumber Co. v. Raymond Light & Water Co. (1916), 92 Wash. 330, 159 Pac. 133, P. U. R. 1916 F, 437; Minneapolis St. P. & A. A. Ry. v. Menasha Wooden Ware Co. (1914), 159 Wis. 130, 150 N.

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provision.[6] California, too, would find no trouble were it not for the untenable "dedication" doctrine, for the California court will not uphold such a contract if made with a company recognized by the court as a public utility at the time of contracting,[7] but the court insists on the "dedication" test.[8] Some jurisdictions appear to regard it as wholly immaterial whether any action had been taken by the state through constitutional amendments, statutes or decisions to define or regulate public utilities before the making of the contracts, for the right to regulate enterprises now known as utilities, "was inherently vested in all the people in common, prior to the time when men found it necessary to make use of their faculties in federating for their common good, and prescribing, through legislative bodies, among other things, the great legal system incidental to public callings and their regulation." Although the people failed fully to appreciate these rights, ". . . . they existed and were vested in all the people prior to the alleged creation of the so-called vested rights of individuals arising by reason of contractual relations." The legislature in passing laws regulating public utilities merely defines and regulates the application of this inherent power.[9] It is clear also that the power by which public utilities are defined and regulated does not in the opinion of the United States Supreme Court have its root in constitutional provisions and statutes, but is an inherent power which existed at common law and which the legislature must apply for the public welfare as required.[10]

In discussing the question of whether the contract rate is subject to alteration under laws subsequently passed, however,

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W. 411, 413 (contract made in 1898 held subject to law of 1913) affirmed by U. S. Supreme Court without opinion (1917), 38 Sup. Ct. Rep. 133, 62 L. Ed. 161; Yeatman v. Towers (1915), 126 Md. 513, 95 Atl. 158, P. U. R. 1915 E, 811; City of Woodburn v. Public Ser. Com. of Ore. (1916), 82 Ore. 114, 161 Pac. 391; Windfield v. Public Ser. Com. of Ind. (1918), 118 N. E. 531 (Ind.); Marquis v. Polk County Telephone Co. (1916), 158 N. W. 927 (Nebr.).

[6] City of Pocatello v. Murray (1912), 21 Ida. 180, 120 Pac. 812; Sandpoint Water & L. Co. v. Sandpoint (1918), 173 Pac. 972, P. U. R. 1918 F, 737 (Ida.).

[7] Pinney & Boyle Case, supra, n. 4.

[8] Supra, n. 1.

[9] Re Public Service Electric Co. (1918), N. J. Public Service Com., P. U. R. 1918 E, 898, 901. Same general view may be gathered from Sandpoint W. & L. Co. v. Sandpoint, supra, n. 6; Atl. Coast Elec. Ry. Co. v. Board P. U. Comm. (1918), 104 Atl. 218 (N. J.); Grand Trunk Western Ry. v. City of South Bend (1910), 174 Ind. 203, 36 L. R. A. (N. S.) 850, 89 N. E. 885, 91 N. E. 809; State ex rel. City of Sedalia v. Public Ser. Com. of Mo. (Mo., 1918), 204 S. W. 497.

[10] See Munn v. Illinois (1876), 94 U. S. 113; Atlantic Coast Line R. R. Co. v. City of Goldsboro (1914), 232 U. S. 548, 34 Sup. Ct. Rep. 364, 58 L. Ed. 721.

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there is a tendency among writers to speak conservatively;[11] on the other hand authorities upholding the view that the contract rate prevails are in a small and dwindling minority.[12] The tendency now becoming evident may even go so far as to hold contracts for service invalid ab initio upon the passage of regulatory acts.[13]

Upon principle there can, it seems, be no question but that the police power cannot be abridged, and when courts talk of contracts being impaired or property rights being destroyed by state regulation they are assuming the very point in issue, viz.: whether contracts absolutely binding in their provisions and rights of property unconditionally vested can attach to businesses which the state through its police power may, as a matter of policy, decide to regulate. Really the only consistent view seems to be that they cannot, for "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject matter."[14] But California's doctrine of "dedication" assumes the question, and it is no answer to say that the court does recognize the binding effect of the police power when it recognizes the business in question as public, for it is no more within the power of the court to decide whether a business is public or not, after it has been so declared by statute, than it is for the court to disregard the police power in regulating rates of corporations and persons concededly doing a public business.[15]

In general there have been no exceptions made to the fundamental principles stated because the contracts were for the distribution of water[16] even where furnished for irrigation purposes with land sold at the same time the contracts were made. As the court in a leading case remarks, ". . . . the larger and

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[11] Wiel, "Water Rights in the Western States" (3d ed.) says: "The matter has usually been treated as an open question, though it may possibly be that the public rate displaces previous contract rates, as well as later ones."

[12] Belfast v. Belfast Water Co. (1916), 115 Me. 234, L. R. A. 1917 B, 908, 98 Atl. 738, P. U. R. 1917 A, 313, held that utilities act could have only prospective effect and not touch existing contracts. This case, however, is criticized as being opposed to the great weight of authority (L. R. A. 1917 B, 908, n.)

The Ohio Pub. Ser. Com. may also be in harmony with the minority view, Re Mahoning etc. Co. (1918), P. U. R. 1918 B, 69.

Some dissenting judges of course express themselves to the effect "that the doctrine that contractual property rights, which are subject to the state's police and taxing powers . . . . are, because of this, not protected from confiscation, is both novel and unsound."

[13] See note, 32 Harvard Law Review, 74, Nov., 1918.

[14] Hudson C. W. Co. v. McCarter (1908), 209 U. S. 349, 357, 28 Sup. Ct. Rep. 529, 531, 52 L. Ed. 828, 14 Ann. Cas. 560; Union Dry Goods Co. v. Georgia Public Service Co. (1914), 142 Ga. 841, 83 S. E. 946.

[15] Supra, n. 1.

[16] Yeatman v. Towers, supra, n. 5.

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broader view, that most consistent with which the law of irrigation should be administered, and that to which courts are more and more tending, is that any contracts entered into between the irrigation company and consumers under the ditch . . . . were subject to legislative control."[17]

Water law in the western states has had a peculiar history, however. This has been particularly so in California, where the statutes and decisions have been conflicting and inconsistent. From 1850 to 1885 the statutes showed a marked tendency in favor of strict public regulation, but a period followed during which contract rights were emphasized. However, in 1911 the legislature began to return to the practice of public regulation and has proceeded in that direction since.[18] Nor were the early decisions entirely consistent. Fresno Canal Co. v. Park[19] upheld the right of contract, while Crow v. San Joaquin Co.[20] in the same year declared for the public rate. Stanislaus Co. v. Bachman[21] followed the Park case and gave the contract doctrine a strong footing, until Leavitt v. Lassen[22] really established the validity of the public rate, though attempting to harmonize the previous inconsistencies. Such was the law when the instant case was decided, which followed the Stanislaus case in principle, although citing the case of Leavitt v. Lassen, in support of some of its distinctions.

How such inconsistencies have been possible since the constitutional amendment of 1879, it is hard to understand. The people then declared that "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state in the manner to be prescribed by law."[23] All contracts for the use of water since 1879 have by implication embodied this provision. The court seems, however, to have drawn no distinctions between contracts made prior to 1879 and those made after. Other western states with similar constitutional provision have given them proper weight, however, and all contracts are held to embody them.[24]

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[17] McCook Irr. etc. Co. v. Burtless, supra, n. 3.

[18] See Wiel, "Water Rights in Western States" (3d ed.) § 1315, pp. 1212 et seq.

Also "The Relation Existing between Irrigation Water Users and Distributing Companies with Special Reference to Rights Arising out of Contract", a thesis submitted for degree of Juris Doctor, University of California, 1916, by Kenneth L. Blanchard. This is a splendid summary of California law.

[19] (1900) 129 Cal. 437, 62 Pac. 87.

[20] (1900) 130 Cal. 309, 62 Pac. 562.

[21] (1908) 152 Cal. 716, 93 Pac. 858.

[22] (1909) 157 Cal. 82, 106 Pac. 404.

[23] Art. 14, § 1.

[24] Supra, n. 6; Northern Colo. Irr. Co. v. Pouppirt (1910), 47 Colo. 490, 108 Pac. 23; Gould v. Maricopa Canal Co. (1904), 8 Ariz. 429, 76 Pac. 598.

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The court in the principal case goes to the extent of finding something more than a contract right; it finds a vested property interest in the form of a water right. From the standpoint of rate regulation however, the question of the ownership of water rights becomes merely a question of reasonableness of rates,[25] and from the point of view of public regulation does not raise any great difficulty until the questions of priorities, extension of service, etc., are reached.[26] Public regulation may be limited to rate regulation, too, and not touch the question of compulsory service[27] notwithstanding the fact that the California court states unequivocally that the only distinction between private and public business centers about the question of compulsory service.[28] Again, the question is one of property rather than of use and use is the important consideration in public utility regulation. In fact the question of water rights should not have been raised in this case.[29] There is an objection to private water rights held by consumers, however, because of the limitation on use. Such rights, therefore, may be as impossible as contract rights, and should be under the California Constitution. Reduced to its final analysis, therefore, the question of water rights begs the whole question (unless the theory of public ownership outlined in the leading text[30] on water law be accepted) for if the law is such that contract rights cannot be established how can the stronger interest of water rights grow up to defeat the police power? This case really leaves the rule of Leavitt v. Lassen and re-establishes the discarded doctrine of Stanislaus v. Bachman.

Viewed then as a contract the right of the consumers upheld by the court in the principal case is opposed to practically all modern authority; it tends to defeat the extension of the doctrine of public callings by making legislation and "dedication" ineffective; and, worst of all, goes the length of holding that an inherent power (the police power) may be defeated by merely making a contract.[31] Looked upon as a water right the question of the right to regulate rates does not necessarily arise, for the question is one of property and not of use. However, difficult problems

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[25] San J. and Kings River Canal and Irr. Co. v. Stanislaus Co. (1914), 233 U. S. 454, 34 Sup. Ct. Rep. 652, 58 L. Ed. 1041.

[26] "Water Titles of Corporations and Their Consumers", Samuel C. Wiel, 2 California Law Review, 273.

[27] German Alliance Ins. Co. v. Lewis (1914), 233 U. S. 389, 34 Sup. Ct. Rep. 612, 58 L. Ed. 1011, L. R. A. 1915 C, 1189.

[28] See principal case.

[29] See Re Lake Hemet Water Co. (1916), 11 Cal. Rd. Com. 617. For objections to consumers water right see article by Samuel C. Wiel, supra, n. 26.

[30] Wiel, "Water Rights in Western States" (3d ed.)

[31] If the making of contracts limited the state's power to regulate, the police power would be subordinate to the right of individuals to contract. Portland R. Light & Power Co. v. R. R. Com. (1909), 56 Ore. 468, 105 Pac. 709, 109 Pac. 273.

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in priority and beneficial use arise. Fundamentally, though, the holding is more radical than the contract theory, for it tends to prevent to even a greater extent the operation of the inherent power of government to regulate for the public welfare.

D. J. W.

CONSTITUTIONAL LAW: PUBLIC AND PRIVATE BUSINESS: RIGHT OF STATE LEGISLATURE TO DECLARE ANY BUSINESS PUBLIC.—Public service legislation[1] is forcing to a definite issue before the courts the question of how far a state legislature may go in declaring a business to be a public service or utility. Constitutional amendments, some of which, as in California,[2] confer upon the law-making body plenary power to define public utilities, have been followed by the passage of public utilities acts including new business in the category of public callings, and the interests affected having no recourse under the state constitutions, have resorted to the federal constitution[3] in an effort to defeat the new acts. Such was the situation when the California legislature included under the definition of public utilities all corporations and persons supplying water to others.[4] The California Supreme Court was called upon to interpret this provision in the case of *Allen v. Railroad Commissioners of California*,[5] which arose before the Railroad Commission when a company supplying water on an enormous scale under contracts applied to have its rates regulated. The consumers objected that to grant the petition would impair their contract rights. The court agreed with this view and practically annulled the statute by holding that "Our Constitution and our statutory definitions . . . . must be construed as applying only to such properties as have in fact been devoted

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[1] Every state in the union except Delaware now has a public utilities law of some kind. See note in 9 Illinois Law Review, 656, where all states are mentioned except Delaware, Utah and Wyoming. Wyoming enacted such a law in 1915, however, and Utah followed in 1917.

[2] Art. XII, § 23. ". . . . every class of private corporations, individuals, or associations of individuals hereafter declared by the legislature to be public utilities shall likewise be subject to such control and regulation."

[3] In practically all cases cited in these notes strong reliance was placed by the business concerned on the fifth or the fourteenth amendment.

[4] Cal. Stats. 1913, Ch. 84, p. 80, § 1. "Whenever any person, firm or private corporation . . . . owning, controlling, operating or managing any water system within this state, sells, leases, rents or delivers water to any person, firm, private corporation, municipality or any other political subdivision of the state whatsoever, except as limited by section 2 hereof, whether under contract or otherwise, such person, firm or private corporation is a public utility . . . ."

In the Public Utilities Act the term "water corporation" is defined as including "every corporation or person . . . . owning, controlling, operating or managing any water system for compensation within this state." Cal. Stats. 1915, Ch. 91, p. 118, § 1, subd. X.

[5] (Oct. 1, 1917), 56 Cal. Dec. 326.

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to a public use and not as an effort to impress with public use properties which have not been devoted thereto." Otherwise, the court reasons, there would be an unjust interference with private property or private contractual rights in violation of the fourteenth amendment. The old California doctrine of "dedication" as expressed in Thayer v. California Development Co.,[6] and as emphasized in nearly all succeeding cases, particularly in the Pipe Line Cases,[7] was reaffirmed, "dedication" to public service being held as essential as the "dedication" of a highway.[8] The court had previously declared, when it expressly held unconstitutional another provision of the California statute, that the legislature cannot declare what shall constitute a public utility, stating definitely that "The legislature possesses no such power."[9] The same view has been expressed in previous volumes of the CALIFORNIA LAW REVIEW.[10]

The necessary effect of these decisions in California is to draw a distinct line between businesses now acknowledged as public callings and so-called private businesses or callings, and to make the change from a private to a public calling depend upon a "dedication" to public service by the owner. Furthermore, the owner may, according to the principal case, be unable to make such a "dedication" if under contract to furnish others at a given price.[11] Is such an analysis of the law sound?

That the "dedication" doctrine is a fiction which does no good, but which only leads to confusion and misunderstanding seems clear, for "In making his property valuable to the public and offering it to the service of the public, the owner does merely what every business man does who invites indiscriminate public patronage,"[12] and "There is no purpose, actual or implied, to part with his proprietary control in the least degree."[13] Even the California court abandons the test of real "dedication" in cases

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[6] (1912), 164 Cal. 117, 128 Pac. 21.

[7] Producers' Transportation Co. v. Railroad Com. (1917), 54 Cal. Dec. 583, 169 Pac. 59, P. U. R. 1918 B, 518; Associated Pipe Line Co. v. Railroad Com. (1917), 54 Cal. Dec. 588, 169 Pac. 62, L. R. A. 1918 C, 849, P. U. R. 1918 B, 633.

[8] San Francisco v. Grote (1898), 120 Cal. 59, 52 Pac. 127; Niles v. Los Angeles (1899), 125 Cal. 572, 58 Pac. 190. Two cases involving the dedication of highways are cited to show what evidence is required to show dedication to a public service.

[9] Associated Pipe Line Co. v. Railroad Com., supra, n. 7.

[10] See notes in 2 California Law Review, 494, and 6 California Law Review, 146, in the former of which the decision of the United States Supreme Court in The Pipe Line Cases (1914), 234 U. S. 548, 58 L. Ed. 1459, 34 Sup. Ct. Rep. 956, is criticized as technically unsound, yet liberal, and in the latter of which the California Pipe Line Cases are defended as sound on principle. In the view of the present writer both notes are open to serious question, the latter in particular being unsound.

[11] See note on this point on another page of this issue of the Review.

[12] Freund, The Police Power, § 372; Wiel, Water Rights in Western States (3d ed.) p. 1116.

[13] Id.

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where corporations or persons engage in a business which the court recognizes as public and will there hold the mere act of engaging in the business a sufficient dedication.[14] In other cases the court will find a "dedication" on slight evidence.[15]

The fallacy of talking about "dedication" in connection with the regulation of utilities is apparent when we consider that "agencies become public utilities independent of a desire of the owners of such agencies and irrespective of any voluntary devotion of their property to public use."[16] For "a business, by circumstances and its nature, may rise from private to be of public concern, and be subject, in consequence, to governmental regulation."[17]

What then is the nature of the question as to when a business is subject to price and service regulations? Is it fundamentally a constitutional question of property or simply a question of policy embraced within the police power and subject exclusively to legislative determination?

That the early common law upheld the regulation of practically every business, including that of the smith,[18] the barber, the merchant, the surgeon and others is not open to question.[19] No distinction, it seems, was drawn between "private" business and "public" business, for the term "business" necessarily implies relations with the public, and to speak of "private business" and "public business" is a contradiction in terms.[20] Furthermore, the abandonment of these regulations was in no way due to any conviction that they were not properly questions of policy under the police power, but to the growth of the economic theory of *laissez faire*.[21] Under the influence of this economic theory courts even refused to uphold the regulation of utilities now uniformly admitted to be public.[22] With the growth of big business concerns, however, and the rapid development of monopolies the *laissez faire*

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[14] Pinney & Boyle Co. v. Los Angeles Gas etc. Corp. (1914), 168 Cal. 12, 141 Pac. 620, L. R. A. 1915 C, 282, Ann. Cas. 1915 D, 471.

[15] Palermo Land & Water Co. v. Railroad Com. (1916), 173 Cal. 380, 160 Pac. 228, P. U. R. 1917 A, 447. An agreement in a contract to furnish water at the price fixed by law was held sufficient to show a "dedication".

[16] Control of Public Utilities in California, by John M. Eshleman, 2 California Law Review, 104.

[17] German Alliance Ins. Co. v. Lewis (1914), 233 U. S. 389, 58 L. Ed. 1011, 34 Sup. Ct. Rep. 612, L. R. A. 1915 C, 1189.

[18] Jackson v. Rogers (1683), 2 Show. K. B. 327, 89 Eng. Rep. R. 968.

[19] Governmental Regulation of Prices, Eugene A. Gillmore, 17 Green Bag, 627; Public Callings and the Trust Problem, Bruce Wyman, 17 Harvard Law Review, 156; Railroad Rate Regulation, Beale and Wyman, § 32; note, 28 Harvard Law Review, 84; Business Jurisprudence, Edward A. Adler, 28 Harvard Law Review, 135.

[20] Adler, Business Jurisprudence, supra, n. 19.

[21] Note, 28 Harvard Law Review, 84; Gilmore, Regulation of Prices, supra, n. 19.

[22] McCanne v. Norwich Gas Co. (1862), 30 Conn. 521.

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theory perished and regulative legislation began anew, the first important case going to the United States Supreme Court being Munn v. Illinois,[23] in which that court upheld an Illinois statute regulating grain elevators because the court found them to be "affected with a public interest", subject to regulation under the police power largely because they were monopolies. The monopoly theory, however, has not limited the later decisions of the same court, but the principle of public welfare has been liberally construed so as to permit the regulation of pipe lines,[24] insurance,[25] sale and distribution of water, [26] taxicab companies,[27] and hours and compensation of labor,[28] and no case has been found in which the United States Supreme Court has given any sanction to the theory that regulation violates the federal constitution, or in which that court has refused to uphold any declaration by a state legislature that a business is public.

The California court, so far as discovered, stands alone in flatly holding unconstitutional a provision of an act declaring certain businesses public,[29] but there are other jurisdictions which have stated that legislative fiat cannot make a business, in its nature private, public and which have avoided the necessity of declaring provisions unconstitutional by resorting to interpretation as in the principal case.[30] There is a tendency, however, to uphold the acts of the legislatures and to let the wording of the statutes rather than the nature of the business govern.[31] California's railroad commission has from the first viewed the question as one of policy,[32] in accord with the view of the United

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[23] (1876), 94 U. S. 113.

[24] The Pipe Line Cases (1913), supra, n. 10.

[25] German Alliance Ins. Co. v. Lewis, supra, n. 17.

[26] Spring Valley Water Works v. Schottler (1884), 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. Rep. 48; Van Dyke v. Geary (1917), 244 U. S. 39, 61 L. Ed. 973, 37 Sup. Ct. Rep. 483, P. U. R. 1917 E, 539.

[27] Terminal Taxicab Co. v. Kutz (1916), 241 U. S. 252, 60 L. Ed. 984, 36 Sup. Ct. Rep. 583, P. U. R. 1916 D, 972. Here Mr. Justice Holmes expressed a doubt as to whether an ordinary livery stable was a public utility, but intimated that the court would hold it to be such if so defined by statute.

[28] Stettler v. O'Hara (1914) 69 Ore. 519, 139 Pac. 743, affirmed without decision (1916), 243 U. S. 629, 61 L. Ed. 945, 37 Sup. Ct. Rep. 475. See note on this question (regulation of employment) 2 California Law Review, 405, by Dean William Carey Jones, in which a broad point of view is expressed.

[29] Associated Pipe Line Case, supra, n. 7.

[30] State etc. Com. v. Monarch etc. Co. (1915), 267 Ill. 528, 108 N. E. 716, P. U. R. 1915 D, 119; De Pauw University v. Public Service Co. (1917), 247 Fed. 183, P. U. R. 1918 C, 274 (Ore.). See note on Illinois cases, 11 Illinois Law Review, 281.

[31] L. R. A. 1918 C, 827, n., in which cases on mutual telephone companies are shown to be in conflict according to wording of various state statutes.

[32] Los Molinos etc. Co. et. al. v. Coneland Water Co. (1915), 8 Cal. Rd. Com. 24, practically contra to principal case; Becker v. California

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States Supreme Court that "a business, by circumstances and its nature, may rise from private to be of public concern, and be subject, in consequence, to government regulation."[33] the commission has, therefore, avoided such practical inconsistencies as may be found in the decisions of Thayer v. California Development Company and Palermo Land & Water Co. v. Railroad Commission.[34]

No decision has been found expressly holding that all businesses are public and vary in degree only, but California seems to recognize that any business may be made subject to public control if the owner makes the so-called "dedication",[35] and the general tendency is to extend regulation, some trying to hold that, while there is a distinction in kind rather than degree between private and public business, all monopolies are public.[36] This view, however, is now discredited,[37] but some eminent authorities hesitate to go the full length.[38] The United States Supreme Court has, however, gone far toward recognizing that the only distinction is one of degree and that the question is one of public welfare, to be handled under the police power, and one which raises no constitutional question of property.[39] Such, too, is the tendency of commissions[40] and state courts,[41] so that in time we may look for a general recognition of the fact that there is no distinct line between public and private business, and that what the California court is trying to uphold as a property right under the fourteenth amendment, in the face of the opposing view of

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Development Co. (1914), 5 Cal. Rd. Com. 153, in which an opposite finding to that of Thayer v. Development Co. is made on the same facts.

[33] German Alliance Ins. Case, supra, n. 17.

[34] Thayer case, supra, n. 6. In this case an enormous company having a monopoly in supplying water to the Imperial Valley was held to be a private concern because it had made no "dedication" while in the Palermo case, supra, n. 15, a small pumping concern supplying 1600 acres was found to be a public utility.

[35] No expression has been found in any of the decisions which would indicate that the court limits the "dedication" doctrine.

[36] Public Callings and the Trust Problem, Bruce Wyman, supra, n. 19.

[37] Brass v. North Dakota (1894), 153 U. S. 391, 38 L. Ed. 757, 14 Sup. Ct. Rep. 857.

[38] Freund, The Police Power, § 375, p. 384, says: "The justification for regulating charges in some particular business would usually be that it constitutes a de jure or a de facto monopoly or enjoys special privileges; but it may also be that the commodity selected is a necessary of life, or that it is essential to the industrial welfare of the community, or that it has been immemorially the subject of regulation."

[39] German Alliance Ins. Case, supra, n. 17; Van Dyke v. Geary, supra, n. 26.

[40] Sharp v. Kranzburg (1918), P. U. R. 1918 D, 862 (South Dakota); Burford v. Consumers' Ditch Co. (1916), P. U. R. 1916 D, 448, (Wash.).

[41] McCook Irrigation etc. Co. v. Burtless (1915), 98 Neb. 141, 152 N. W. 334, P. U. R. 1915 C, 587, L. R. A. 1915 D, 1205; Yeatman v. Towers (1915), 126 Md. 513, 95 Atl. 158, P. U. R. 1915 E, 811.

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the United States Supreme Court, is but one of policy and as such a question for the legislature.[42]

D. J. W.

CRIMINAL LAW: THE INDETERMINATE SENTENCE.—A series of cases recently before the California courts, of which *Ex parte Bouchard*[1] and *Ex parte Lee*[2] are examples, have called the attention of the lawyer and the layman to the indeterminate sentence law[3] passed by the last legislature. The constitutionality of that measure has been definitely settled in Ex parte Lee, and its applicability to all those committing the designated crimes since July 27, 1917, has been established. The preliminary legal questions having been settled, it may be proper to devote a few words to the penological theories involved in the statute.

Punishment serves four purposes: as a reparation for the crime, as a means of reforming the criminal, as a deterrent to others, and as protection to society. Tarde[4] characterizes these purposes by the terms, "expiatory, exemplary, reformatory, and sanitary." Historically emphasis has been placed successively upon each of these ends of punishment, and as first one and then another was placed in the foreground, the kind and amount of punishment have changed accordingly.

Various criteria have been used in determining the kind and amount of punishment to be inflicted upon the wrongdoer. In the earliest times, the rank of the person injured fixed the penalty; later the crime itself was the standard; and finally the criminal was considered in meting out the penalty he must suffer for his infraction of the law. The first criterion has practically disappeared from civilized nations; the second and the third are those now used in determining the penalty for the crime.

The forms of punishment now in common use are death, imprisonment, and fine. At one extreme stands capital punishment. Reformation has no part here, and the nature of the crime alone fixes the penalty. The character of the man found guilty of first degree murder, save as bearing on the question of parole or commutation of sentence, has nothing to do with the punishment decreed. At the opposite extreme from capital punish-

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[42] As to the broad scope of the police power, and for unequivocal holdings that it is a matter which must be left to the legislative judgment where possible, see Munn v. Illinois, supra, n. 23; Atlantic Coast etc. R. R. v. Goldsboro (1914), 232 U. S. 548, 58 L. Ed. 721, 34 Sup. Ct. Rep. 364; Noble State Bank v. Haskell (1911), 219 U. S. 104, 55 L. Ed. 112, 31 Sup. Ct. Rep. 186; United R. R. v. San Francisco (1917), 239 Fed. 987; Erie R. R. Co. v. Williams (1914), 233 U. S. 685, 58 L. Ed. 1155, 34 Sup. Ct. Rep. 761.

[1] (Oct. 16, 1918), 27 Cal. App. Dec. 495.
[2] (Mar. 8, 1918), 55 Cal. Dec. 489.
[3] Cal. Pen. Code, § 1168; Cal. Stats. 1917, Chap. 527, p. 665.
[4] Penal Philosophy, G. Tarde, Chap. VIII, pp. 473-527.

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ment stands the fine. Here is no thought of expiation. The aim of the fine is to be a deterrent. A man must keep his automobile within the speed ordinance or pay the price of its violation. In this class of offenses, the law usually leaves a wide margin between the maximum and minimum punishment, and the judge frequently takes into consideration the character, reputation and wealth of the person before him, as well as the nature of the offense, when assessing the fine. Lying between the extremes of death penalty and the fine is imprisonment. In this form of punishment are found all four purposes, while in the determination of its length both the crime and the criminal are factors. The usual statutory provisions for prison sentences are far too rigid. Long terms are imposed for reparation and as a deterrent, and to exclude the malefactor from society; short terms are imposed to give reformed prisoners their freedom. But today as formerly, prisoners are usually treated as a class, and sufficient allowance is not made either by statute or by the discretion of the magistrate for individuality of treatment.

Two parallel tendencies have been noticeable in penal reform,—in the purpose and in the "individualization of punishment."[5] From being regarded as retribution for crime and an example to evildoers, the end of punishment became reformation. Probation, suspended sentence, prison reform, education within prisons, and parole indicate this. The tendency today, however, is to regard the end of punishment neither as reparation nor as reformation, but as the protection of society. This view of the aim of punishment involves both the other purposes, for it requires that those who can be reformed shall be returned to society and those who can not shall be permanently excluded. Along with this development as to purpose has come the "individualization of punishment." The man, his character, his conduct, his environment, his education, such factors are entering more and more into the determination of the penalty. So today the purpose of our penal statutes might be summarized in the phrase: "Punishment to fit the criminal, and at the same time to offer the best protection to society."

The indeterminate sentence meets this two-fold requirement. The California statute provides that the judge shall not fix the term, but that the prisoner shall be released at some time between the maximum and minimum provided by law, that time to be decided by the board of prison directors; and in making this decision they shall consider the prisoner's "career, habits, degree of of education, age, nativity, nationality, parentage," etc. In this way the offender, after he serves his minimum, remains in prison only so long as he deserves. In the words of Wilbur J., in Ex parte Lee, "It is generally recognized by the courts and by modern penologists that the purpose of the indeterminate

[5] The Individualization of Punishment, R. Saleilles.

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sentence law, like other laws in relation to the administration of the criminal law, is to mitigate the punishment which would otherwise be imposed upon the offender. These laws place emphasis upon the reformation of the offender. They seek to make the punishment fit the criminal rather than the crime. They endeavor to put before the prisoner great incentive to well-doing in order that his will to do well should be strengthened and confirmed by the habit of well-doing."

There is another side to the indeterminate sentence often overlooked both by its advocates and its opponents. It not only frees the man who deserves his freedom, but it continues to keep in prison the man who should not be permitted to return to society. The recidivist, or habitual offender, under a definite sentence, was set at liberty whether reformed or not at the expiration of his term. If given an indeterminate sentence the prison authorities could detain him until he served his maximum term or until they deemed him ready for discharge. Interesting figures come from Indiana where the indeterminate sentence plan has been in operation for more than twenty years.[6] Those figures indicate that it has resulted in lengthening the term of service in prison. The last three hundred men received in the Indiana prison under the old definite form of sentence served an average of one year, nine months, fourteen days. The first three hundred received under the indeterminate sentence served an average of three years, two months, twelve days. When it is noticed that the increase in the length of the average term under the new law is due largely to the longer terms served by men convicted of incest and rape, the figures have an added significance. For these crimes are peculiarly crimes resulting from psychopathic causes, and are therefore likely to be the acts of recidivists.[7]

The indeterminate sentence operates not only to save society from the recidivist, but, as Ferri[8] says, "The liberation of the condemned would take place with the certainty of his re-adaptation to the social environment." It serves at the same time to individualize punishment and to offer the best protection to society. As Mr. Brockway, the sponsor of the first indeterminate sentence law, passed in New York in 1877, phrases it: "The principle of the indeterminate sentence rests upon the opinion that all the legitimate objects to be gained by imprisonment of

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[6] XI American Statistical Association, p. 84.

[7] An interesting example is given by Aschaffenburg, Crime and its Repression, translated in Modern Criminal Science Series, 299, of a sexual offender who had been confined in prison eight times during fifteen years for the same sort of offense. The author predicted in his first edition that he would repeat the crime as soon as released. In his second edition, he is able to state that his prophecy has come true!

[8] Criminal Sociology, Ferri, p. 509.

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offenders are included in the one purpose of public protection from crimes."[9]

Many advocates of the indeterminate sentence object to the form of the California statute, providing for a maximum and minimum term. They assert that to achieve its aim, the sentence must be without upper or lower limit. This may be theoretically correct; but the success of the plan will be determined by its practical operation. Prison guards and prison officials as a result of an imperfect administrative system in our state governments may not always be trusted to act independently and intelligently. This point of view was presented by a recent writer,[10] who declares the prisoners themselves are opposed to the indeterminate sentence because the length of their stay would depend too largely on the arbitrary will of not too capable prison officials. Until the system has passed the experimental stage it is perhaps better to place upon prison officials the check of the minimum and maximum limits of sentence. After the statute has been in operation for some time, and its results have been observed, it may be time to abolish artificial limits and carry the indeterminate sentence to its logical conclusion.

L. B. S.

EVIDENCE: JUDICIAL NOTICE OF MUNICIPAL ORDINANCES.—The case of *Marysville Woolen Mills v. Smith*[1] states the almost universal rule that courts of general jurisdiction, civil or criminal, will not take notice of the ordinances of a municipality, but that such ordinances must be pleaded and proved. The appellant in the principal case insisted that while no change was made in the method or mode provided by the state law of taxation, that by various ordinances of the city of Marysville changes with reference to the dates of assessments, delinqencies, sales and other matters provided for in the tax law as laid down in the Political Code in 1876 were made, including a change as to the date when the taxes should become delinquent, and that under said modifications the sale in question, made here on December 4, 1914, was authorized.

The court said, however, that "assuming that the city of Marysville had the authority to change the state law with reference to taxation to the extent contended for by appellant, the trouble in this case is that there is no evidence that this was in fact done." It was the duty of the appellant to show that the general law which governed upon the subject had been

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[9] 17 Charities, p. 866.

[10] 108 Atlantic Monthly, p. 330 (1911). The article was signed "A Prisoner."

[1] (Sept. 5, 1918) 56 Cal. Dec. 269, 272; Carpenter v. Shinners (1895) 108 Cal. 359, 41 Pac. 473; Chamberlayne's "Best on Evidence", p. 255.

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modified or changed. The general law required that the tax sale be made on the first Monday in January, 1915. The certificate of the tax sale produced in evidence, together with the testimony of the officer who made the sale, which was the only evidence on the subject, show that the sale was actually made on the 4th of December, 1914, and at a time when under the law the taxes were not yet delinquent. In the light of the facts of the case, there is no conflict between the decision and the provision of Section 459, Code of Civil Procedure, because there was in the record no reference to the ordinances claimed by the appellant to have been passed, and we may infer that had there been sufficient mention, judicial notice might have been taken as has been done in other cases.[2] However, the court does not definitely say this, but clearly lays down the general rule stated above.

The reason for this attitude on the part of the Superior Courts is that the practice has grown up of regarding municipal ordinances as private statutes and treating them as included in the provision of Section 963, Penal Code.[3] This practice is confirmed by the decisions[4] and has been recognized by the amendment of 1907 to Section 459 of the Code of Civil Procedure, which expressly provides that "a private statute, or an ordinance of a county or municipal corporation may be pleaded by reference to its title and the day of its passage." It is to be noticed, however, that as the statutes now read, there is an advantage given to the prosecution in criminal cases. In such cases, if the ordinance be pleaded by mere reference to its title and the date of its passage, even the superior courts must take judicial notice of it.[5] On the other hand, in a civil case, the ordinance may be so pleaded, but no provision is made whereby the court may thereupon take judicial notice and so it remains to be proved as well. The passage of an ordinance is proved prima facie, by producing in evidence the ordinance book from the custody of the clerk showing the regularity of the proceedings for its adoption; the burden of contradicting the record by showing that it was not passed as stated in the record is upon the defend-

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[2] Ex parte Childs (1905), 1 Cal. App. 41, 81 Pac. 667; Ex parte Davis (1896), 115 Cal. 445, 47 Pac. 258; City of Tulare v. Hevren, (1899), 126 Cal. 226, 58 Pac. 530.

[3] Cal. Pen. Code, § 963. "In pleading a private statute, or a right derived therefrom, it is sufficient to refer to the statute by its title and the day of its passage, and the court must thereupon take judicial notice thereof."

[4] Metteer v. Smith (1909), 156 Cal. 572, 574, 105 Pac. 735; Tilton v. Russel (1916), 171 Cal. 731, 735, 154 Pac. 860; City of Tulare v. Hevren, supra, n. 2.

[5] Ex parte Davis (1896), 115 Cal. 445, 47 Pac. 258; Cal. Code Civ. Proc., §§ 1918 (5), 1963 (15), 1920.

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ant.[6] These code provisions and the decisions under them show that the California courts tend to an attitude of leniency in the matter of judicial notice of municipal ordinances by making both pleading and proof as simple a process as possible without wholly recognizing the practice that has been established by statute in other states, in compliance with which courts of general jurisdiction take judicial cognizance of municipal ordinances.[7]

The general rule that courts of general jurisdiction will not notice such ordinances is subject to several exceptions. For instance, city ordinances when confirmed by legislative enactment or declared to have the force and effect of public statutes will be judicially noticed in all courts.[8] Also, a higher court on appeal will take judicial notice of any matter of which the court of original jurisdiction might take notice.[9] But where a cause is triable de novo on appeal from the municipal court's decision, the authorities are divided as to whether notice will be taken of an ordinance.[10] Moreover, when the proceeding is in a municipal court, instituted for the express purpose of enforcing the municipal ordinance and vested with full jurisdiction for that purpose, the rule is different. In such case, the ordinances are the peculiar law of that forum and it is bound to take notice of their existence,[11] the reason being that every court is presumed to know the law under which it acts.

The justices of the peace of cities of the first to fourth classes inclusive, have the same jurisdiction, civil and criminal, as justices of the peace of townships and township justices' courts. But they have in addition jurisdiction of all proceedings for the violation of any ordinance of any city in which courts are established both civil and criminal, and of all actions for the collection of any license required by any ordinance of any such city and generally exercise all powers, duties and jurisdiction, civil and criminal, of police judges, judges of police courts, recorder's court or mayor's courts within such city.[12] We find that in the justices' and police courts, judicial notice is taken of their municipal ordinances, in both civil and criminal cases.[13] Pleadings in such courts are usually without regard to form,

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[6] Merced Co. v. Fleming (1896), 111 Cal. 46, 43 Pac. 392; San Diego Co. v. Siefert (1893), 97 Cal. 594, 597, 32 Pac. 644; People v. Zimmerman (1909), 11 Cal. App. 115, 104 Pac. 590.

[7] Pettit v. May (1874) 34 Wis. 666; Woolley v. Louisville (1903) 114 Ky. 556, 71 S. W. 893.

[8] Brady v. Page (1881), 59 Cal. 52.

[9] Gay v. City of Eugene (1909), 53 Ore. 289, 100 Pac. 306.

[10] Village of Minneola v. Martin (1914), 124 Minn. 498, 145 N. W. 383.

[11] People v. Mueller (1914), 168 Cal. 526, 143 Pac. 750; Ex parte Davis (1896), 115 Cal. 445, 47 Pac. 258; Cal. Code Civ. Proc., § 1875 (2).

[12] Cal. Code Civ. Proc. § 103.

[13] Ex parte Luening (1906), 3 Cal. App. 76, 84 Pac. 445; O'Callaghan v. Booth (1856), 6 Cal. 666.

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therefore reference to the statute is not necessary;[14] and as already shown, they will be judicially noticed because they are established by law.[15]

Thus we find that municipal courts will judicially notice municipal ordinances, but the superior courts will not. The California system of pleading and proof is, however, a semi-recognition of judicial notice even in the Superior Courts. Why not make it a full recognition, as has been done in some states by statute?[16] A municipal ordinance is well established and authoritatively settled; it is not doubtful or uncertain. Is it not safe to assume its existence without proof and its knowledge within the limits of the jurisdiction of the court? Judicial notice will be taken of a custom or usage which has become general to a sufficient extent;[17] why not of a municipal ordinance? Would it not be "a saving of time, labor and expense in securing and introducing evidence on matters which are not actually bona fide disputed; the tenor of which can safely be assumed from the tribunal's general knowledge or from slight research on its part?"[18]

M. H. V. G.

INTEREST ON UNLIQUIDATED DEMANDS.—When a demand is liquidated the law implies a promise to pay interest at the legal rate[1] from the date it fell due. The theory is either that the law implies a promise to pay interest as damage for the unlawful detention and use of the money[2] or for the breach of the contract.[3] Where the demand is unliquidated, interest runs from the date of judgment, i. e., of entering judgment.[4] The reason is that the debtor is not in default because he does not know how much is due.[5] The latter rule has been so modified by definitions and exceptions that it is of little use.

Liquidated generally means defined, settled, ascertained. In regard to interest, the exception to the rule of unliquidated demands which allows interest on a demand which can be ascer-

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[14] Watson v. Whitney (1863), 23 Cal. 375; Cal. Code Civ. Proc., §§ 933, 929.

[15] Cal. Code Civ. Proc., § 1875 (2).

[16] Supra, n. 7.

[17] Bernard v. Benson (1910) 58 Wash. 191, 108 Pac. 439; 124 Am. St. Rep. 20, 54, n.; Schultz v. Ford Bros. (1906) 133 Iowa 402, 109 N. W. 614.

[18] Wigmore, "Pocket Code of Evidence", p. 475.

[1] Cal. Civ. Code, § 1917.

[2] Cal. Civ. Code, § 1915; Dodge v. Perkins (1830), 9 Pick. (Mass.) 368.

[3] Sedgwick on Damages (2d ed.) p. 136.

[4] Cutting Co. v. Canty (1904), 141 Cal. 692, 697.

[5] Meyer v. Buckley (1913), 22 Cal. App. 96, 133 Pac. 510; Brady v. Wilcoxson (1872) 44 Cal. 239.

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tained by mere computation or reference to settled market prices[6] has become so well established that the definition of liquidated demands has been extended to include such demands.[7] "Liquidated" is so used in *Howard v. Hobson*.[8]

Two exceptions might be taken to calling the demand liquidated in this case. Although the point has not been raised in regard to a demand for interest, it is settled in the law of accord and satisfaction that where one of two sums is admitted to be due and there is a bona fide dispute as to which is due, the demand is not liquidated and the question of bona fides is one to be determined by the trial court.[9] In the principal case, there was a dispute as to whether the division should be made of the gross or net profits, and the contract was ambiguous. The point was not decided on the question of liquidation, but as an immaterial difference between the facts alleged and proved under section 469 of the Code of Civil Procedure.

The definition of "unliquidated" is further extended in cases holding that where the right to recover is bona fide disputed, although the amount, should there be a recovery, is settled, the demand is not liquidated in relation to the defendant.[10] The rule is applied that interest is not given, though the demand is not defined as unliquidated, in Griggs v. Granford.[11] This definition seems inflated to the breaking point, and the rule is dangerous, for in almost all cases of contract litigation the liability under the contract is denied. In Howard v. Hobson it is denied on the ground that the purchase was not under the option, and that the contract was within the Statute of Frauds. The rule in California is that once the plaintiff has shown facts entitling him to recover a sum of money from the defendant which the defendant refuses to pay, he has shown damage and is entitled to interest.[12]

Not only must the demand be liquidated to entitle the plaintiff to interest under the general rule, but the date the principal falls due must be settled by the terms of the contract or by implication.[13] Unless the date is set there can be no default in the debtor.

After this there is an exception made to the rule of no inter-

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[6] Cal. Civ. Code, § 3287; Cox v. McLaughlin (1888), 76 Cal. 60, 67; Courteney v. Standard Box Co. (1911), 16 Cal. App. 600.

[7] Sutherland on Damages, § 347.

[8] 27 Cal. App. Dec. 509.

[9] B. & W. Engineering Co. v. Beam (1913), 23 Cal. App. 164, 137 Pac. 624.

[10] Baker County v. Huntington (1907), 48 Ore. 593, 89 Pac. 144; Seaside v. Ore. Surety Co. (March, 1918), 171 Pac. 396, 399; Siverson v. Clanton (April, 1918) Ore., 171 Pac. 1051.

[11] (1892), 50 Ill. App. 172.

[12] Bartlett v. O. F. Savings Bank (1889), 79 Cal. 218, 223.

[13] Jones v. Gardner (1881), 57 Cal. 641, Knowles v. Baldwin (1899), 125 Cal. 224, 227.

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est on an unliquidated debt. If the date is settled, and the liability to pay something is undisputed, the only question being the amount due, interest has been allowed from the date the principal fell due.[14] In New York this is the settled rule; in Florida the distinction between liquidated and non-liquidated debts is practically obliterated, and this rule is followed in Missouri, Texas, Wyoming, Illinois, Wisconsin, Georgia, Connecticut and Minnesota.[15] The word liquidated could not possibly be extended to cover this situation, so some other ground must be found. The holding is probably based on the rule that interest may be had on demands not liquidated or capable of being liquidated except by agreement of the parties or adjudication where the debtor is in default because of vexatious delay in not taking the steps necessary to ascertainment.[16]

Instead of clinging to an outworn rule and torturing the definition of the word liquidated beyond recognition, it would be better to look into the basis of all of the awards of interest. From the decisions it is clearly shown that interest is allowed from the time the creditor was entitled to the principal when, and only when, the debtor can be shown to be in default in not paying the money.

H. V. D.

SALES OF PERSONAL PROPERTY: THE DOCTRINE OF POTENTIAL EXISTENCE.—In the case of *State Bank of Ramona v. Clelland*[1] the court said by way of dictum, "that personal property having a potential existence may be mortgaged." Among the property described in the mortgage was the following: "All my bees, bee material, implements, hives and produce of bees." Why was it necessary in order for this mortgage to be valid to resort to the archaic doctrine of potential existence?

The doctrine of potential existence is a common law fiction. There is no doubt of the possibility both at common law and under our law today of contracting to sell goods which the seller does not own at the time.[2] But it is obvious in the nature of the case that it is impossible for a seller to transfer presently title to goods to which he has no ownership at the time of the sale. As he has no title he can give none.[3] The common law

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[14] Mix v. Miller (1881), 57 Cal. 356.

[15] Sutherland on Damages, §347.

[16] McCowen v. Pew (1912), 18 Cal. App. 482, 123 Pac. 354; Estate of Sanderson (1887), 74 Cal. 199, 215, 15 Pac. 753; McMahon v. N. Y. & Erie R. R. (1859), 20 N. Y. 463, 468; Scroggs v. Cunningham (1876), 81 Ill. 110.

[1] (Sept. 3, 1918), 27 Cal. App. Dec. 296.

[2] Williston on Sales, §128, n. 3.

[3] Emerson v. European R. R. Co. (1877), 67 Me. 357, 24 Am. Rep. 39; Skipper v. Stokes (1868), 42 Ala. 25, 57, 94 Am. Dec. 646.

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made an exception to this rule in the case of crops and the young of animals, which the seller, as the owner of the root and stem, was afterwards to acquire, and gave it a wider effect than a contract to sell. The doctrine was laid down in the leading case of Grantham v Hawley[4] that the crops of specified land, the wool to be clipped in the future from specified sheep, or the future young of specified animals, can be bargained and sold at law, because the seller has potential possession. Though the doctrine seems to have been rarely invoked no limitation of it has ever been suggested in England by courts. In 1846, it was applied against an attaching creditor of crops who was deprived of the property attached because it had been mortgaged by the occupant of the land before it came into existence.[5] The effect of this doctrine, obviously based on a fiction, is not only that the legal title to the future property passes to the buyer as soon as the property comes into existence, but that this title is regarded as relating back to the time of the agreement. Since these decisions the doctrine, so far as discovered, has not been referred to in the English Reports, and the Sale of Goods Act apparently discards it in providing that, "Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods."[6] Therefore, since the passage of the Act it may be assumed that the doctrine of potential existence is abolished in England.

The American Sales Act adopted by the committee in 1906 to make uniform the law of sales, makes no exception to the general rule as to future goods in favor of goods of which the seller has potential possession.[7] The Sales Act, therefore, apparently abolishes the doctrine of potential possession from the law of sales, which, however, has no application to mortgages. The Sales Act has already been enacted in seventeen states,[8] but California is not one of them. The California Civil Code[9] provides that any property which if in existence might be the subject of sale, may be subject for agreement of sale, whether in existence or not. The courts have interpreted this to allow the sale of future goods in which the vendor at the time of the agreement has a potential ownership.[10] The sale becomes complete

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[4] (1616), Hob. 132.
[5] Petch v. Tutin, 15 M. & W. 110.
[6] Sale of Goods Act, §5 (3).
[7] Sales Act, § 5 (3).
[8] Arizona, Connecticut, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, Utah, Wisconsin, Wyoming.
[9] § 1730.
[10] Cutting Packing Co. v. Packers (1890), 86 Cal. 574, 25 Pac. 52, 21 Am. Rep. 63; Shoemaker v. Acker (1897), 116 Cal. 239, 48 Pac. 62; Blackwood v. Cutting Co. (1888), 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199; Brower v. Anderson (1888), 77 Cal. 236, 19 Pac. 487; Central Oil Co. v. Saulhenn Ref. Co. (1908), 154 Cal. 165, 97 Pac. 177, 81 Am. St. Rep. 42-46.

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when the product or increase comes into existence, and title passes to the vendee as a present vested right.

In all cases the thing sold must be founded on a thing *in esse*. A mere possibility or expectancy not coupled with an interest in or growing out of the property cannot be made the subject of a valid sale or transfer.[11] For instance one has no potential property in a catch of fish he expects to make even though he has a ship and nets and all other appliances necessary for catching fish. He has no property actual or potential until they are caught, and cannot pass any property right in them until that time.[12]

Should the Sales Act be adopted in California these agreements for the sale of future goods, whether they have potential existence or not, could not amount to anything more than agreements to sell. The abolition of the doctrine is wise. If the ordinary doctrines applicable to real and personal property do not afford as much protection as is desirable to transactions relating to crops or animals the extent of the right of the seller should be exactly defined and more closely limited than is done under the doctrine of potential possession. There is no reason that such transactions should give peculiar protection to the possible prejudice of innocent creditors or purchasers.[13]

If the doctrine be abolished by the Sales Act, is it necessary in order that a chattel mortgage of after-acquired property be valid that we resort to the doctrine of potential existence? At common law, it is doubtless true, that a party could not mortgage property not then *in esse*, so as to vest title in the mortgagee when the property came into existence.[14] But at civil law he could.[15] In California a mortgage may be given on real property to be acquired by the mortgagor after the execution of the mortgage.[16] A chattel mortgage of property not in the possession of the mortgagor at the time of making the mortgage is valid. As to the effect of the mortgage of future goods, it is clearly established that the mere agreement to mortgage personal property subsequently to be acquired gave the mortgagee a lien upon the property as soon as it was acquired, good as between the parties,[17] even though the formalities prescribed in Section 2957 of the Civil Code have not been observed.[18] Whether a chattel mortgage upon a crop to be planted is valid is a ques-

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[11] Wheeler v. Wheeler (1859), 2 Met. 474, 74 Am. Dec. 421.

[12] Low v. Pew (1871), 108 Mass. 347, 11 Am. Rep. 357; Modern American Law, Vol. 4, p. 294.

[13] 19 Harvard Law Review, 559.

[14] Sharfenburg v. Bishop (1872), 35 Iowa 66.

[15] Domat, on the Civil Law, Part I, Book III, Title 1, §1; 76 Am. Dec. 723, n.

[16] California Title Co. v. Pauly (1896), 111 Cal. 222, 46 Pac. 586.

[17] Works v. Merritt (1895), 105 Cal. 467, 38 Pac. 1109.

[18] Lemon v. Wolff (1898), 121 Cal. 274, 53 Pac. 801; Calif. Title Co. v. Pauly, supra, n. 16.

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tion upon which the decisions are in conflict in the various states. Whatever may be the law in other states, the right to make a chattel mortgage upon crops before the same have been planted, has become an established rule of property in this state,[19] and the mortgagee's lien attaches as soon as the property is acquired. It is only necessary that such after-acquired property shall be capable of identification in order to give the mortgagee a valid lien.[20] Since a lien is recognized on these after-acquired goods, thereby making these chattel mortgages valid[21] without any new act on the part of the mortgagee, what particular advantage can there be in the artificial doctrine of potential existence?

T. A. M.

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[19] Pingree Chattel Mortgages, § 217 et seq.

[20] Arques v. Wassan (1877), 51 Cal. 620, 21 Am. Rep. 718; Hall v. Glass (1899), 123 Cal. 500, 56 Pac. 336, 69 Am. St. Rep. 77; Wilkerson v. Thorp (1900), 128 Cal. 221, 60 Pac. 679; Lemon v. Wolff, supra, n. 18.

[21] Muir v. Blake (1882), 57 Iowa 662, 11 N. W. 621; supra, n. 20.

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Book Reviews

A TREATISE ON THE POWER OF TAXATION, STATE AND FEDERAL, IN THE UNITED STATES. By Frederick N. Judson. The F. H. Thomas Law Book Company. St. Louis, 1917. pp. xxx, 1144.

This is the second edition of a book which has become a recognized authority on its subject. The recognition which the work has received has proceeded wholly from its intrinsic merits. If the first edition filled a need in 1902, this new edition fills an almost greater need; for the interval of fifteen years between the two issues of the book has been marked by great activity and progress in the matter of taxation. New demands in the way of social betterment have called for new methods of taxation. Such calls have been met by response in statutes in many of our commonwealths. The Federal government, too, has had unusual pressure brought upon it, and the scope of its taxing interests has grown enormously. Judicial decisions have followed legislation. A great mass of law, statute and judicial, has thus developed, and has called for adequate treatment at the hands of a trained and competent jurist.

Mr. Judson has fulfilled the expectations one would have formed from his previous performance. The new edition is marked by the same sound, judicious and accurate discussion of problems that characterized the first edition. A new chapter has been added on "Enforcement of Limitations upon Federal Taxation." A hundred or more sections have been added, and some four hundred new cases have been cited. We have here a book that is admirable for the wisdom of its judgments, as well as for the accuracy and brevity of its expression.

W. C. J.

THE LAW RELATING TO TRADING WITH THE ENEMY TOGETHER WITH A CONSIDERATION OF THE CIVIL RIGHTS AND DISABILITIES OF ALIEN ENEMIES AND OF THE EFFECT OF WAR ON CONTRACTS WITH ALIEN ENEMIES. By Charles Henry Huberich. Baker, Voorhis and Company. New York, 1918.

While the signing of the armistice has terminated actual hostilities, the formal treaty of peace will be required to put an end to conditions of belligerency. And with the treaty an endless vista of legal questions arising out of the war opens up. After the Napoleonic war and after our own Civil War, the reports for several years were replete with cases discussing various aspects of the law of war in its relation to private rights. With the intricate and elaborate legislation which has supplemented and in part supplanted the common law on the subject, there will be need for many years to come of the lawyer's familiarizing himself with the subject.

Dr. Huberich's book affords the starting point for investigation

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of the numerous questions which will arise in practice. The author supplies an authoritative treatment of the general law, irrespective of statutes, and a comprehensive commentary upon our Trading with the Enemy Act of 1917. The British and Colonial Acts are also printed in full. Dr. Huberich has, however, not merely compiled materials, though he has done this well. His work is constructive and full of intelligent careful discussion of the principles and the latest authorities. The author is one of the best qualified persons in America to perform the task he has undertaken. His preparation is most unusual. An American lawyer, a former law teacher, with a thorough training in Continental law and an experience derived from practice for several years in European capitals, Dr. Huberich's equipment is unique.

The book is an essential for any lawyer whose practice touches any question arising out of the law of alien enemies.

O. K. M.

INTERNATIONAL LAW CODIFIED. By Pasquale Fiore. Translated by Edwin M. Borchard. Baker, Voorhis and Company. New York, 1918. pp. xix, 750.

This translation of Fiore's International Law Codified was undertaken at the invitation of the Division of International Law of the Carnegie Endowment for International Peace, and was made from the fifth Italian edition.

First issued in 1890, the work is not a codification of existing international law but "a proposed body of rules which should govern states in their mutual relations", and as such will have only the weight which the author's learning and its own reasonableness may give it.

Fiore's great object is to effect a legal organization of the states of such a character and with such machinery that it may both make and enforce international law. The principal defect at present is lack of organization. To meet this lack he proposes the periodical meeting of a Congress which shall have power to legislate and to provide for the enforcement of the laws thus made by collective action of the states. Arbitration he regards as insufficient to meet the complex questions which disturb the peace of states and therefore he proposes a conference, which, upon the request of any state, would settle political controversies, interpret ambiguous rules of law, and insure the execution of the rulings of the Congress.

This attempt to establish a doctrine of the "international rights of man", according to which every human being has international rights irrespective of his citizenship in a particular state, will hardly be accepted as scientific; nor will the practical application of it meet with greater favor, since he claims for every individual the unrestricted freedom of migration and expatriation, and the right to hold real property in any state. His recognition of the controlling power of public opinion and the need of doing away

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with secret treaties and diplomacy are much more likely to secure acceptance.

However much one may differ from the distinguished author in regard to his scheme of international organization or respecting individual rules of law which he formulates, it is, nevertheless, a matter of congratulation that this English translation has been made available to the American public. A larger acquaintance with the problems presented cannot fail to be of great advantage and the solutions here offered are worthy of careful consideration.

E. E.

Books Received

HANDBOOK OF MILITARY LAW. By Austin Wakeman Scott. Harvard University Press, Cambridge, Mass. 1918. pp. vii, 104, paper. $.75.

THE ARMY AND THE LAW. By Garrard Glenn. Columbia University Press, New York. 1918. pp. 197, cloth. $1.75.

COMMERCIAL ARBITRATION AND THE LAW. By Julius Henry Cohen. D. Appleton & Co., New York. 1918. pp. 44, 339, cloth. $3.00.

THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL. Harvard Law School Association, Cambridge, Mass. 1918. pp. 10, 412, cloth.

JUDICIAL TENURE IN THE UNITED STATES. By William S. Carpenter. Yale University Press, New Haven, Conn. 1918. pp. vii, 234, cloth. $1.50.

GREAT EUROPEAN GOVERNMENTS. By A. Lawrence Lowell. Harvard University Press, Cambridge, Mass. 1918. pp. 41, 329, cloth.

THE UNSOUND MIND AND THE LAW. By George W. Jacoby. Funk & Wagnalls Co., New York. 1918. pp. xiv, 424, cloth, $3.00.

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Procedural Reform

THE process of adjusting the law to the altered needs of economic and social life—a process that is never ending—has been in recent years and in particular at the present time is seriously engaging the minds of sober-minded people the world over. The relations between independent sovereignties, the internal structure of states, the institutions of private law, such as property, contract and the family, theories of responsibility and liability both in criminal and in civil law, either are undergoing transformation through dramatic and cataclysmic changes or are suffering modification through the influence of forces operating slowly and silently, though none the less ceaselessly. Procedural law, using the phrase in the widest sense, has not been exempt from the general movement.[1]

I.

One of the most notable phenomena of this latter age in the the field of procedural law has been the encroachment by admin-

[1] To one who wishes to follow the movements of procedural reform in the United States, the Bulletins and Journal of the American Judicature Society, of Chicago, are indispensable. A general acknowledgment is here made to these publications, which have been constantly referred to during the preparation of this article. In the same manner acknowledgment is made to the Preliminary Report on Efficiency in the Administration of Justice, prepared by Charles W. Eliot, Moorfield Storey, Louis D. Brandeis, Adolph J. Rodenbeck and Roscoe Pound for the National Economic League, 1914. This report, which bears evidence of having been in large part the work of Dean Pound, is the classical statement of the new program. See also Dean Pound's epoch-making papers: Causes of Popular Dissatisfaction with the Administration of Justice (1906) 395, 413; The Organization of Courts, Minnesota Bar Association Reports, 1914, 169; Regulation of Judicial Procedure by Rules of Court, 10 Illinois Law Review, 163; Principles of Procedural Reform, 4 Illinois Law Review, 388, 491; The Administration of Justice in the Modern City, 26 Harvard Law Review, 302; Procedure in Common Law, California Bar Association Reports (1916) 86, and remarks pp. 129-140. Reference should also be made to Justice Through Simplified Procedure, a Symposium, in the Annals of the American Academy of Social and Political Science. For a full bibliography of the literature on revision of the judicial system, see California Bar Association Reports (1916) p. 300; 11 Illinois Law Review, 451.

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istrative bodies upon the jurisdiction of the ordinary courts—a tendency observable in England, the traditional home of justice according to law, as well as in our own country. It is true that this movement is not yet so marked in England as it is here, and that it has begun to evidence itself more recently there than with us. For example, in the case of the Workmen's Compensation Acts, Parliament left the determination of the questions arising under the acts to the courts, whilst it has been the general practice in our country with its greater distrust of magistrates and courts to place the matter in the hands of extra-judicial bodies. Later English statutes, however, notably those dealing with social problems, such as health insurance and old age pensions, follow the American practice in withdrawing the settlement of questions under the acts from the courts. It is unnecessary, however, to enumerate instances to illustrate so obvious a truth as that administrative law is everywhere developing at a more rapid rate than the civil law and to some extent at its expense.[7] By reason of this process civil procedure is constantly becoming relegated to a position relatively less important than that which it formerly occupied. Modern tribunals erected to administer the new machinery have rarely followed, save in a broad and general way, the analogies of the procedure obtaining in the civil courts.[8] To a certain extent the correcting hand of the courts is constantly guiding and directing the new administrative tribunals, and particularly is this the case in our own country where the fundamental law of the constitution controls every individual, officer, tribunal and legislative body. But this guidance and control is general in its nature and is bound to become less important as there is developed through the reciprocal interaction of the boards and courts a definite body of administrative law.

The lessened importance of the ordinary law of civil remedies is evidenced by a practice becoming increasingly frequent, namely,

[7] Dicey, The Development of Administrative Law in England, 31 Law Quarterly Review, 148; id., Law and Opinion in England (2d ed.) xliii. Cf. remark of the editor, Sir Frederick Pollock, 6 Law Quarterly Review, 238: "English tradition favors decision by a legal tribunal of all cases which directly or indirectly may involve legal questions." The Growth of Administrative Law in America, 31 Harvard Law Review, 644, is a suggestive and learned contribution. Cf. Alvarez, The Progress of Continental Law in the 19th Century, 48-50. It is perhaps worthy of notice that in the days of the Tudors, English practice was leaning toward the employment of commissions. Cf. 43 Eliz. c. 12, commissioners to determine disputes concerning insurance.

[8] Pillsbury, An Experiment in Simplified Procedure, 3 California Law Review, 181.

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that of creating in our greater centres of population tribunals with special summary jurisdiction, modern courts of piepoudre, with the difference that they are more particularly courts for the wage-earner than for the merchant. Somewhere the Italian criminologist Ferri speaks of the codes of criminal procedure as being codes modeled for gentlemen, and allowing for the exaggeration, the same might be said of civil procedure. Ferri meant that the traditional code of criminal procedure contemplates a fair and equal fight between society and the individual and therefore implies that the individual shall have a certain amount of social and economic independence, not in fact possessed by the greater part of those most directly subject to the penalties of the criminal law. Probation laws, indeterminate sentence laws, psychopathic laboratories, juvenile courts, and other devices, punitive, reformatory and preventive, are rapidly lessening the modicum of truth in Ferri's generalization respecting the codes of criminal procedure, though at the same time diminishing to some extent the importance of the classical principles of the criminal law. In like manner, such institutions as municipal courts, small debtors' courts, conciliation courts, domestic relations courts, are occupying a portion of the field of civil remedies. The individualistic theory of procedure is as much neglected by such courts as it is by the agencies before mentioned in the field of criminal procedure. Such institutions are serving to bring the results which law seeks to achieve to many who would otherwise be devoid of legal protection in respect to the matters determined in these tribunals. At the same time they are occupying a portion of the field formerly occupied by ordinary tribunals proceeding in the traditional manner. In the case of the Municipal Court of Chicago, the simplified, efficient and expeditious procedure of the court has drawn to it civil matters of great importance.[4]

If the workingman is no longer obliged to appeal to the ordinary courts with their judicial remedies to collect his wages, to settle his domestic troubles, to receive recompense for injuries received in the course of his employment, the merchant and the manufacturer (at the opposite extreme of the economic system) have voluntarily availed themselves of non-judicial remedies to adjust their legal disputes.[5] The arbitration clause in commercial contracts has in England almost ousted the regular courts of

[4] Reports of the Municipal Court of Chicago.
[5] Cohen, Commercial Arbitration and the Law (1918); 2 Journal American Judicature Society, 43-58 (August, 1918).

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jurisdiction in commercial matters, and this notwithstanding the unfriendliness of the courts and their attempt, by the establishment of the so-called Commercial List, under the power of amendment of procedure granted the courts by the Judicature Acts to create what is in effect a commercial court operating under a more expeditious procedure than the ordinary tribunals.[6] If in America the arbitration clause has not yet attained the practical universality which it has secured in England, adjustment of legal difficulties through boards of trade and similar agencies is very frequent, and with improved organization of business is becoming more frequent every day.[7] The history of the Commercial List in English practice would seem to show that business men cannot be tempted by a judicial procedure as simple and liberal as that which they enjoy before their own arbitrators, to submit their legal difficulties to professional judges. Evidently, as is indicated by their neglect of their opportunity to have their disputes settled before professional judges in a highly expeditious and simple manner, they prefer the interpretation of the substantive law given by members of their own trade to its authoritative exposition by the courts. Possibly the expense of legislation even of a summary kind is an additional reason for the merchant's unwillingness to go into court. The Judicature Commission, composed of some of the ablest legal minds of England, so far back as 1874 recommended that mercantile trials should be had before a judge assisted by two mercantile experts.[8] Had this proposal been adopted, English practice might have been assimilated to that existing in several of the continental nations of Europe, as for example in France where the merchants administer the commercial law in their own courts, whose judges are selected by the merchants themselves out of their own class.[9] But what

[6] Rosenbaum, Commercial Arbitration in England (Bulletin XII, American Judicature Society) 49; id., The Rule-Making Authority, 131, 136.

[7] For a description of the work of the Arbitration Committee of the New York Chamber of Commerce, see remarks of its chairman, Charles L. Bernheimer, at the 1918 Conference of Bar Association Delegates, of which Mr. Root was chairman, 5 American Bar Association Journal, 45-52 (January, 1919).

[8] Rosenbaum, The Rule-Making Authority in the English Supreme Court, 132.

[9] Mitchell, The Law Merchant, chap. iii. The absence of the special court of commerce from our system has been attributed to the existence of a popular element, the jury, in our administration of justice. Goldschmidt, *Du droit commercial et des tribunaux de commerce. Revue de droit international*, 1870, 557, 564.

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the law making power in England declined to do has come about in practical effect through the operation of voluntary extra-legal agencies.

The unwillingness of English law makers officially to recognize the autonomy of the merchant group stands in striking contrast with the French practice. Indeed, French law has ever been disposed to grant a greater liberty to groups within the state than has our own or the English system. The family council with its extensive powers in the matter of guardianships and other family questions seems to our minds an exotic institution. And it has not yet occurred to the English or American legislator to permit the inspection of mines under safety appliance acts to be carried out by representatives selected by the miners themselves, as is done in France.[10] The merchants' courts afford another illustration of a tribunal of a sort unknown to English law or to our own. History and tradition in large part account for such differences. For example, the existence of the jury in the civil procedure of England to some extent serves to explain the fact that it was unnecessary in that country to perpetuate the mediaeval merchants' courts. The popular or lay element in the administration of justice was supplied by that institution. Lord Mansfield with his special juries of merchants so shaped the ordinary civil law in the eighteenth century when its need of re-adaptation was greatest as to enable it to respond to the needs of commerce. The law thus evolved is the basis upon which the modern business man demanding even more flexibility rests his demands for arbitration. Social needs are worked out in some manner, if not by legal, then by extra-legal means, and in the modern organization of economic life the extra-legal agencies possess sanctions almost as effective as those of the code of civil procedure. Observation of recognized legal institutions by no means exhausts the study of the law-making process.

Whether or not the arbitration principle receives indefinite expansion lies, of course, in the bosoms of the gods.[11] It is sufficient to point out the possibility that a number of matters that now present themselves before the official tribunals may

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[10] See various examples in "Progress of Continental Law in the 19th Century", pp. 57, 83.

[11] For a humorous but thoughtful picture of the future, describing the "café courts," etc., see Wells, The Man in Court, 267, 283, a book written by a Justice of the Municipal Court of New York City, full of keen psychological insight and based on actual experience.

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hereafter be relegated to the arbitration of voluntary tribunals. The tendency to shift the determination of many questions to administrative and presumably specialized agencies rather than to leave them to professional courts for decision may conceivably join itself to the other tendency on the part of groups to settle and adjust the disputes of the members of the group. Whether or not such a result would be desirable is a debatable question, but whatever the doubts the student of procedural questions should not be oblivious of present practice, nor shocked at its extension. The existing system of procedure is but half understood if the observer closes his eyes to the fact that already important classes of the community are determining their disputes before tribunals of their own selection, that the principle of authoritativeness has already undergone a great diminution, and that the modern administration of law frankly admits the existence of classes and groups in the community.[12]

If, however, the judgment and the execution are becoming less important in the processes of modern life than they were a couple of generations ago, it will not do rashly to conclude that the compulsive principle has been entirely elbowed out from the law of today, or is likely to disappear in the future. On the one hand legal remedies to a large extent supply the ultimate force behind the extra-legal ones. On the other hand the very cumbersomeness of judicial procedure is one of the impelling causes toward the creation of those extraordinary instrumentalities which today are serving to administer so large a part of the law. In both directions the organization of procedural law is one of great importance, and the study of its adaptation or non-adaptation to the affairs of modern life demands serious attention.

II.

One of the fundamentals usually assumed as axiomatic in all discussions regarding procedural reform is that justice should be administered by the courts with cheapness. But the *advocatus diaboli* may well be heard upon the contrary of this proposition before the assumption is granted. It may be urged that it is not necessarily the case that cheapness in the pursuit of ordinary judicial remedies is altogether desirable, and that it is conceivable

[12] "All labor legislation to be of worth has to be class legislation in one sense of the word." Ely, Contract and Property in their Relation to the Distribution of Wealth, II, 644; Freund, Standards of American Labor Legislation, 269.

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that a system of judicial remedies may rest upon a theory, express or implied, that application to the courts for relief should rather be discouraged than encouraged. The petty litigant and his attorney are likely to be unqualified nuisances; cheap justice has a distinct tendency to provoke unfounded and speculative litigation to the detriment of the community. The poor man with the tort claim for personal injuries is but one side of the picture; the ambulance chaser is the other. As a matter of fact English legal administration appears to the uninitiate to be organized upon a principle which makes the cost of resort to the courts considerable, though it casts the final burden of the expense upon the party in the wrong.[13] Under such a plan only questions which really demand judicial intervention will, in general, be brought into court. For neither will plaintiffs seek to enforce speculative claims, nor will defendants attempt to interpose unfounded defenses where costs are deterrent. If people lose money rather than gain by resisting or attempting to delay the enforcement of fair demands against them, presumably they will not resort to such means. At any rate the assumption that cheapness of justice is an absolute desideratum is by no means axiomatic.[14]

The determination of even so fundamental a proposition as the theory upon which the administration of justice should be founded with reference to the question of expense can, in view of the lack of available material for investigation, be made upon grounds of sentiment or prejudice. Before any opinion that is worthy of serious discussion can be expressed, it is necessary that the working of various systems should be observed in detail. Take, for example, one special sort of litigation—that in connection with negligence cases. What is the sum total of the recoveries obtained in a given city in a given time? What proportion does this sum total bear to the total expense of liti-

[13] Leaming, A Philadelphia Lawyer in the London Courts, 97-100; Higgins, English Courts and Procedure, 98 (Bulletin XI, American Judicature Society). English writers criticize the expense. Dicey, Law and Opinion in England (2d ed.) 209.

[14] The Roman law adopted a similar plan. Institutes, 4, 16, pr. (Moyle's trans.) "It should here be observed that great pains have been taken by those who in times past had charge of the law to deter men from reckless litigation, and this is a thing that we too have at heart. The best means of restraining unjustifiable litigation, whether on the part of a plaintiff or of a defendant are money fines, the employment of the oath, and the fear of infamy. . . . . In certain cases where the defendant denies his liability the action is for double or treble the original claim, as in proceedings on unlawful damage, and for recovery of legacies bequeathed to religious places."

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gation in that class of cases? What ratio do these figures bear to the total loss by accidents occasioned by negligence? How do these figures compare with figures in connection with similar litigation in other cities and industrial centers? Possibly if information were at hand on such questions and others like them a study might be made which would lead to constructive results. Possibly it might lead to the conclusion, as has been suggested by eminent jurists, that the whole matter of personal injury claims might well be removed from the field of ordinary civil remedies and turned over to administrative tribunals.[15] But it may also be a possibility that a study of the problem might show that many of the evils incident to this sort of litigation are due to the cheapness and ease with which such claims may be presented to the courts under the systems usually prevailing in our states.

III.

Whatever may be said concerning the possible merit of an organization of procedure systematically designed to discourage trifling and unjust litigation, the assumption that justice should in all cases be cheaply procurable, without delay and by simple means, rests in our country upon such solid ground in the sentiments of the community that it must be accepted as a basic principle in studying the problems. There seems to be little welcome in American theory for the notion that it should ever be an expensive matter to invoke the aid of the courts. Even such moderate suggestions for the purpose of relieving congested appellate calendars as that the costs of appeal should be made high to discourage frivolous and unmeritorious appeals, or that penalties should be imposed upon unsuccessful appellants, usually meet with scant sympathy. So, too, there seems to be a disposition to leave the amounts delimiting the jurisdiction of courts substantially unaffected. In the State of California, for example, the dividing line of jurisdiction between the justices' courts and courts of superior jurisdiction and the test for the right of review by appellate courts has remained at three hundred dollars since 1862, though during this period the purchasing power of money has rapidly declined.[16] Yet few lawyers or laymen argue that the evils of congested calendars in appellate

[15] Storey, The Reform of Legal Procedure, 81-85.

[16] Cal. Const., Art. VI, § 4; Amendment, 1862, to Art. VI, § 4; Cal. Code Civ. Proc., § 76. On the history of the adoption of the elective system in the United States, generally, see Carpenter, Judicial Tenure, 178-185.

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courts should be remedied by the arbitrary denial of the power to appeal save in cases of considerable importance with respect to the amount involved in controversy. The passion for equality which characterizes us as a people forbids resort to all such artificial palliatives. There is a general sentiment that the highest courts should remain open to the humblest litigant.

The tendency to multiply judicial offices represents a crude attempt to meet the demands that all should be afforded an opportunity to resort to the courts and have their cases determined with some degree of despatch. The singular spectacle is presented by reason of this multiplication of judicial offices, that many of our individual states require more judges to perform the judicial work of the state than the United Kingdom of Great Britain and Ireland. Thus, in 1900, Massachusetts, with less than one-twelfth of the population of England and Wales, required many more judges. The figures were: 51 judges of the higher courts in Massachusetts as against 34 in England and Wales; and a total of 144 judges altogether in Massachusetts as against 93 in England and Wales. Mr. Moorfield Storey points out that if England were equipped with judges in the same proportion to population as Massachusetts, she would have had 1666 judges instead of 93.[17] California now has 145 judges of the Superior Courts, District Courts of Appeal and Supreme Court. To complete the comparison between the two systems, the federal judges, the members of the industrial accident board and the justices of the peace should be added to the number of judges in California. It is only fair to point out that the English system—which has been introduced into the British colonies—stands alone in providing very few judges for the administration of justice. France is liberally provided with magistrates, whilst Germany in 1906 had nearly 9000 judges.[18] The English policy has been to magnify the importance of the individual judge and the dignity of the judicial office by limiting the number of judges, securing permanency of tenure and paying very large salaries. We have proceeded for the most part in the opposite direction, and in this respect our practice resembles that of the continental states of Europe rather than that of the country from which our legal system is derived.

In one respect the American state judicial system, outside of a few of the original states of the Union, is comparable with

[17] Storey, The Reform of Judicial Procedure, 187-189.
[18] 124 Preussische Jahrbücher, 428.

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no other well-known system save the Russian as it existed under the Empire of the Czar. Nowhere but in Russia under the old régime and in the States of our Union has the elective system in modern times been applied to the judiciary.[19] In our States, however, the election is usually not made by the voters at large, but by those of the counties. Except so far as the courts of appeal are able to correct verdicts and judgments, usually upon points of law alone, each county is almost autonomous in the administration of justice. Every official connected with the courts owes his position to his neighbors, and not to the people of the State in general. The judge, the sheriff, the clerk, the bailiff, the stenographer, the district attorney, the jury, the police, all are elected by the people of the county or are appointed or chosen by some one so elected. No direct correlation exists between these officials and the officials of the state. When to this extreme decentralization in the administration of justice is added the fact that the judge is usually elected for a term of years, more or less short, and in some states is subject to popular recall even during that term, it is apparent that there could hardly be a worse machinery devised by which to secure that a rigid system of legal rules should be applied inflexibly to the facts which may be the subject matter of litigation.[20] Only one further step in the process of submitting our legal development to the direct influence of temporary political and social influences could be taken, and that would be to deliver the entire machinery of justice into the hands of non-expert laymen. There have been in the history of our judicial system evidences of a desire to effect this result.[21]

It is possible that this unique system of organization whose result has been to minimize the power and importance of the individual judge is a mere accident in our historical development, and that the future evolution of our procedural system may not be conditioned by its past, in other words, that the present situation represents only a transitional stage and not a necessary result of American life and thought. But it should be noted in this connection that this localizing and decentralizing movement has hitherto been the dominating one in respect to our judicial organization. The original states began with

[19] Encyclopaedia Britannica (11th ed.) Art. Russia, xxiii, 577. In Russia, the elective principle was applied only in the case of the lower magistracy.

[20] California Bar Association Reports (1917) 25.

[21] For example, in New Jersey. Baldwin, The American Judiciary, 257.

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courts framed on the English model, with judges appointed by the executive and holding office during good behavior. A very few states still continue to retain this system or something quite analogous to it. But the overwhelming majority have long since abandoned this principle, the states formed since 1850 uniformly. The constitutional legislation of California concerning the judiciary is typical as illustrative of the localizing tendency.[22] The Constitution of 1849 provided for a Supreme Court with appellate jurisdiction only, whose judges were elected by the people of the state, and for District Courts with trial jurisdiction whose judges were elected by the people of their districts, which usually embraced several counties. The Constitution of 1879 abolished the District Courts and substituted in their place Superior Courts with judges elected by the people of the respective counties. When in 1904 the District Court of Appeal was added to the Supreme Court as an appellate tribunal, the justices were elected not by the people of the state but by the people of the districts within which the Court exercised jurisdiction. Even the minor magistrates, the police judges and the justices of the peace, are elective officials, and chosen from smaller local subdivisions than the county.

These features—the multiplication of judicial offices, the general adoption of the elective principle in the selection of the magistrates to fill these offices, the substitution of terms of office in place of tenure during good behavior, and finally the practice of selecting from local subdivisions of the state magistrates and others charged with the function of administering the law are so general as to warrant their being designated as characteristics of American judicial organization. All these features have the purpose to make the courts more responsive to popular will and to diminish the principle of authority. Recent practices and suggestions do not justify the belief that the movement in the direction of popularization has lost its force. On the contrary, they suggest that it is proceeding with accelerated velocity. Thus, the judicial recall has been adopted in several states besides California, and its possible adoption in other states is deemed so probable that an important section of the American Bar Association has been created to oppose the movement.[23] One state, Mississippi, which long preserved the appointive principle, has recently abandoned it in favor of the elective system.

[22] Id., 312.
[23] Judson, The Judiciary and the People, 179.

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A strong but hitherto unsuccessful attack has been directed against that principle in Massachusetts, and the platforms of radical parties demand the selection of federal judges by popular vote and the abolition in the federal system of the principle of tenure during good behavior. Of a different character, but indicative of popular temper in respect to the power and dignity of the judicial office is the suggestion that courts be denied the power, at least by a mere majority of judges, to declare legislative acts unconstitutional, a suggestion that became the subject of a constitutional amendment in North Dakota.[24] In some instances, the courts have been denied the power to review the constitutionality of legislation conferring powers upon certain favored agencies,[25] whilst in England trade unions have been declared by Act of Parliament immune from suit.[26] The power of courts to punish for contempt has, in some states, been limited by provisions that trials in such matters should be had before juries.[27] The effect of the unlimited right of appeal has also tended to weaken the power of the judge, especially in jury trials, where he is usually restrained by constitutional limitations from commenting upon the evidence. Finally, the position of the courts in respect to the development of the legal system is constantly becoming relatively less important. Legislation has assumed a more important role in the modern state as the basis of the creation of law than is occupied in the earlier stages of the development of our legal system. As Dean Pound points out, there is little room today for the creative task which such men as Marshall and Story and Kent performed in the first half of the last century. The work of the courts has become chiefly that of interpretation, rather than the evolution of new legal principles.[28]

It may be doubted whether all the desired results in the direction of rendering the administration of law responsive to popular will have followed from the experiments tried in our country minimizing the magistrate's powers. Mr. Albert M. Kales, in an interesting study made a few years ago, demonstrated by a review of the cases upon the question of the con-

[24] American Bar Association Reports (1917) 377.
[25] Cal. Const., Art. XII, § 22 (Railroad Commission); Art. XX, § 21 (Industrial Accident Board).
[26] Jenks, Short History of the English Law, 329.
[27] Beale, Contempt of Court, 21 Harvard Law Review, 161.
[28] Preliminary Report on Efficiency in the Administration of Justice, 10. Cf. however, Carpenter, Judicial Tenure in the United States, 210.

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stitutionality of various pieces of social legislation that it was for the most part the elective courts that had held such laws invalid, whilst the appointive courts as a rule had sustained their constitutionality.[29] A similar investigation with reference to the question as to the relative importance attributed to procedural points by elective and appointive courts respectively would, it is believed, establish the proposition that the latter courts are on the whole more ready to decide questions upon their merits than the former. Some figures may be of interest upon this matter. Between 1907 and 1909 out of 325 cases examined, in the English courts, there were only two reversals on points of pleading, a ratio of 1 to 162. Such points were discussed in only one case out of every thirty-six. In Massachusetts, during 1910-1911, there was only one reversal on such points out of every 92 cases, and discussion of pleading points in one out of ten cases. When we pass to elective courts, in New York between 1909 and 1911, one out of thirteen cases was reversed on the pleadings; in Ohio, one out of nine; in California, during the same period, one out of fifteen.[30] Rules of procedure have sometimes been shields behind which the timid magistrate may avoid the responsibility of deciding something that he would rather not decide; a system that holds in its very essence a threat against the security of judicial tenure can hardly produce an attitude of boldness on the part of the judges. It must be remembered, however, that at the time Mr. Kales' study was made, the elective system was scarcely an actuality, as indeed he himself elsewhere points out. The candidates for judicial office as for other offices were selected by those persons controlling political machines; the voter merely had an apparent choice between the appointees of party managers. The introduction of the direct primary and of the principle of non-partisanship in respect to judicial candidates have, however, largely diminished the effect of the criticisms made against the elective judiciary. But the fundamental fact remains even under such improved machinery that the judicial administration for the most part remains based in our country upon a principle infusing a more extensive popular element into judicial administration than is elsewhere the case.

[29] Cf. Hall, Selection, Tenure and Retirement of Judges, 16-18 (American Judicature Society, Bulletin X).

[30] Figures taken from article by Professor Whittier, Notice Pleading, 31 Harvard Law Review, 508, though they are cited by the learned author for a different purpose.

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Any proposed ameliorations in present conditions must proceed from existing facts. Unfortunately arguments too often set out from abstract theories concerning the nature of law that no longer have place in the modern world. Thus a distinguished lawyer in a series of able articles published a few years ago upon the subject of procedural reform says: "This general respect for the courts is induced, not only by the ability and purity of the personnel of the judges, not only by the efficiency of the executive branch of the government assigned to enforce the judicial decrees, but also and to a very great extent, by the mysterious dignity of the courts. The scarlet gown and flowing wig of the Lord Chief Justice of England, the black robes of the Justices of the Supreme Court of the United States, greatly increase the weight of their decrees; and every habit or institution which tends to reduce the courts to the level of the litigants and the public over whom they hold sway tends to hamper their exercise of the function we are now considering—the production and maintenance of a general respect for law."[21] Conceding the truth of the subtle connection between institutions and external forms, it may well be doubted whether the twentieth century man is much affected by the "mysterious dignity" of the courts. He has no particular reverence for the wig and gown, which he regards rather as anachronisms than as solemn symbols. Respect for law must find a wider basis upon which to rest than is afforded by a reverence for mere external incidents or even for the abstract conception of a set of forms absolutely moulding and determining human conduct.

IV.

Constructive remedies for the improvement of legal administration and procedure usually set out from the theory that our courts must be emancipated from the limitations imposed by rigorous legislative rules, thus falling in line with the general tendency to substitute flexibility for rigidity, discretion for mechanical rule of thumb, freedom controlled by opinion for authority resting on power. Already much has been accomplished in this direction through an altered attitude on the part of courts with respect to the matter of technical errors in the admission of evidence and informalities in pleading and practice. But a demand exists for an even more thorough reform, and in this

[21] Sims, The Problem of Reforming Judicial Administration in America, 3 Virginia Law Review, 604.

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demand the American Bar Association leads the way. Through its influence the Supreme Court of the United States has in recent years effected a complete revision of its rules, and in some states, the entire matter of procedure has been left to be determined by rules of court. It is probable that the time is not remote when rules of procedure will be established not by legislative action but by the courts aided by representatives of the bar. The model afforded by the English Rule Committee under the amendments to the Judicature Act may not be entirely suitable to American conditions. Under our social and political system it will be necessary, no doubt, to give a wider representation to trial judges and members of the bar than exists in the case of the Rule Committee. However, the Rule Committee is worthy of most serious study by American students. A quotation from a description of its powers and organization by a careful and competent observer from our own country, may be worth reproducing.[32] "The authority to make rules of procedure is now vested in a committee of twelve persons, who include the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the President of the Probate, Divorce and Admiralty Division, four other judges of the Supreme Court, two barristers and two solicitors, the four last-named being representatives of the Bar and of the Law Councils respectively. In its discretion lies the making or amending of all rules affecting the sitting of the court, the duties of its officers, pleading, practice, procedure and costs of proceedings therein. Within the scope of its authority, rules can be made, amended or repealed as frequently as it considers necessary and the power has been freely used."

It will not be sufficient for legislatures to permit Supreme Courts or other courts to make rules of procedure and leave the matter in that position. Precisely that power was conferred upon the Michigan court in 1850, but sixty-five years elapsed without anything being done by the court in pursuance of its powers.[33] It is necessary for the effective working of the rule-making authority that a body directly charged with that function should be provided as has been done in England. How far such a body would go in the direction of simplifying the

[32] Rosenbaum, Studies in English Civil Procedure, 63 University of Pennsylvania Law Review, 165.

[33] Sunderland, The Michigan Judicature Act of 1915, 14 Michigan Law Review, 273.

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present system is of course a matter as to which one cannot prophesy. But an instance or two may point out some of the possibilities. Take, for example, the matter of pleading—a survival from a system of trial that has become almost obsolete in modern practice. The suggestion that formal pleadings be abolished has long since been adopted in part in the English practice; in 1915 it was adopted to the fullest extent in Michigan.[34] In 1881, an official committee composed of Lord Chief Justice Coleridge, Lord Justice James, Justices Hannen and Bowen, Attorney General James, Solicitor General Herschell (later Lord Chancellor) and other distinguished members of the bar expressed themselves as follows: "The Committee is of opinion that, as a general rule, the questions in controversy between litigants may be ascertained without pleadings." They recommended the adoption of a rule that "No pleadings shall be allowed unless by order of a judge."[35] A recent article by Professor Clarke B. Whittier of Stanford University makes out a strong case for the principle of "notice pleading."[36] Even though the reform of pleading may not be so thorough as suggested by the committee of the English bench and bar, or as suggested by Mr. Whittier, much may be done by the provision of common forms by rules of court. This has recently been done in New Jersey.[37] There is no apparent reason why there should not be a single form for negligence cases, for actions in insurance policies, even for specific performance or foreclosure cases. The rule committee or the judicial council, if such a body were created, would of course have the duty to determine what special rules respecting pleading ought to be adopted. It is of interest to note in passing that the Conference of State Bar Association Delegates established by the American Bar Association has recently recommended that a sub-committee on uniform judicial procedure should be created for each state.[38] The study of procedure, if this recommendation be adopted, will be undertaken with more or less enthusiasm in nearly all the States.

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[34] Id.

[35] Thayer, Preliminary Treatise on the Law of Evidence, 367, n. 3.

[36] Notice Pleading, 31 Harvard Law Review, 501. Cf. Isaacs, Logic v. Common Sense in Pleading, 16 Michigan Law Review, 589.

[37] Practice Act, New Jersey, 1912.

[38] 5 American Bar Association Journal, 38 (January, 1919).

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An effective body of opinion can be created by this means which may in time bring about important practical results.[39]

As has already been pointed out one of the greatest difficulties in the way of procedural reform lies in the fact that our system of judicial administration lacks unity. The rule-making power, call it what you will, judicial council or what not, would furnish an important element in securing cohesion in the administration of justice. But more than that is needed—a responsible minister of justice, whether so denominated or not is immaterial. This commissioner or secretary of justice, or judicial superintendent, or chief justice, should be charged with the function of supervising the administrative machinery of the courts. The creation of such an official would give a centre about which might crystallize some sort of organization in place of our present formlessness and lack of organization in judicial matters. It may be pointed out that our state governments present the only instance to be found in the civilized world of utter formlessness in this respect. The Lord Chancellor in the English system though falling short of the continental Ministers of Justice in his powers and responsibilities nevertheless exercises a real control over judicial administration, possessing in effect the appointing power in respect to all judicial officers. Even in our federal system, the department of justice exercises much influence in respect to legislation dealing with the judicial system, and contains, possibly in an unsatisfactory form, the germ of a supervisorial power over the machinery of justice. The American Judicature Society has for some years been advocating in its publications the centralization of the supervision of the courts' administrative functions in some such officer.[40] Its program goes indeed much further and embraces the complete unification of all courts in a single court with a chief justice, an administrative official, at its head, in whom is vested the power of appointing judges as well as of arranging such matters as the assignment of judges to special departments, the arrangement of calendars, and the numerous other administrative problems involved in the workings of the courts. If one cannot entirely agree with all the details of the plan and if local conditions

[39] Pound, A Practical Program of Procedural Reform, 22 Green Bag, 448, explains how bar associations may procure remedial legislation.

[40] See, in particular, Bulletins VI, VII, VIIa, IX, X and XIII

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and local prejudices and predispositions may render necessary certain modifications of its features, the essential idea of a responsible official charged with the general task of supervision of the courts and aided by a council made up of judges and lawyers seems to possess an essential vitality. Take, for example, the matter of improving means for the selection of judges. The existence of a responsible superintendent might, without disturbing the essential principle of popular election, furnish a means whereby the voter might be guided in his choice at the primaries. A recommendation by such responsible official might constitute an important element in the candidate's chances of success, just as the failure to recommend an incumbent might affect his opportunity for re-election unfavorably. It might well be a part of the duty of the judicial superintendent to make such recommendations in the case of candidates for election to judicial offices. To a certain extent he would represent the principle embodied in the Roman institution of the censor. Our present system lacks any organ of responsible criticism, destructive or constructive. In a world whose driving force is opinion, it would seem fundamentally essential that some organ should exist whereby that opinion can be instructed.

These three elements, a procedure fixed by rules instead of by rigid statutes, a proper rule-making body and an official elected to supervise and centralize administrations, are proposals which seem to bear in them the germs of constructive development in procedural law.

V.

Immediate programs of reform however excellent are of small importance in comparison with the cultivation of proper sentiment upon which such programs may rest. Co-operation of bar and bench is absolutely essential to make any system workable. "The Masters and Judges rely as much on the co-operation of solicitors and counsel as they do on the Austinian theory of the binding force of law," we are told by an American student of English procedure.[41] In our own country formerly this co-operation was fostered by the close personal relations existing between lawyers and judges,

[41] Rosenbaum, Studies in English Procedure, 63 University of Pennsylvania Law Review, 105.

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relations favored by conditions that forced members of the bench and of the bar to travel together, to live on circuits at the same inns, to meet on the familiar plane of neighborly intercourse.[42] Modern customs of life, especially in cities, tend to produce impersonal relations between court and counsel and between members of the bar. There is little opportunity or desire for close associations, and such associations as exist are social rather than professional. The spirit of co-operation is impaired and thus one of the strongest influences upon the development of the law, professional opinion, an influence that has been most powerful in the evolution of other legal systems, is minimized in America.

One of the most hopeful signs for jurisprudence is the growing interest of lawyers in bar associations and their work. If such institutions served only to compel closer and more numerous contacts between members of the profession, they would serve a most desirable purpose in stimulating group consciousness and along with such group consciousness that which is closely associated with it, the professional instinct, what Professor Veblen calls the instinct of workmanship. But already such organizations have achieved much in the way of direct improvement of legal conditions. The gradual elevation, for example, of the standards of legal education and of admission to the bar is in large part due to the consistent support of the American Bar Association. To the influence of that association also belongs much of the credit for the growing interest in procedural reform—the Equity rules of the Supreme Court and the amalgamation of equitable and legal procedure are the direct results of its efforts. The recent movement whereby the national association is brought closer to the state associations by the conferences of delegates from the latter organizations promises well for legal progress on broad and intelligent lines. The future of procedural reform is in the hands of a trained profession.[43]

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[42] See the interesting description of the friendship between Lincoln and David Davis in Hill, Lincoln the Lawyer.

[43] On the development of the bar association movement, begun in 1878, with the creation of the American Bar Association, see Cohen, The Law: A Business or a Profession?

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The Proposed Community Property Bills

THE Community Property bills[1] before the California legislature are worthy of special attention by the legal profession, not only for their practical importance in the business world, but as marking a significant advance in the historical development of property relations between spouses. The agitation for change comes from the growth of the feminist movement in recent years, the growth of a political classification based on sex.

Former changes have come about from different motives. For example, wealthy men of property have wanted to provide for their daughters and make sure that the property would not be controlled or wasted by the husbands the daughters might marry.[2] This result has been accomplished satisfactorily in almost every modern jurisdiction. Accordingly there has not been a great deal of change in the property laws relating to married women except what has been brought about by the agitation of the feminist movement. This has resulted, however, in creating a certain atmosphere of bias and prejudice, obscuring the real issues. The present law of California, for example, is attacked on the ground that it prevents married women from controlling their own property. This, of course, is not entirely true. It is perfectly competent for man and woman, either before, at or after marriage, to enter into a contract regulating their property relations in any way they may see fit.[3] They have just the same powers in this regard as two men. It is, of course, true that after marriage, when the community rights of the husband have become vested, he cannot be compelled to relinquish those rights, but every woman has the power before marriage to insist upon a satisfactory arrangement for the property to be subsequently acquired by either. The law forbids nothing; it simply covers the cases where the parties have not provided otherwise.

Another charge is that the law constitutes an unjust discrimination against women. There was doubtless some justification

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[1] Assembly Bills, Nos. 696, 698, introduced by Miss Broughton; Senate Bills 470, 471, introduced by Senator Thompson. Assembly Bills 697, 200, and Senate Bills 472, 522, 680, also have some bearing on the matter.

[2] Dicey, Law and Opinion in England, p. 383.

[3] Cal. Civ. Code, § 159.

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for this in the early stages of legal development.[4] A woman could not be the head of the family, but her position in the family was not materially different from that of the men, especially the younger men; all were equally in the power of the head of the family. The decay of the family as an important social, legal and political unit resulted in the emancipation of the men from guardianship, and somewhat more tardily the women, so that it became possible to say of the England of the fourteenth century: "Private law with few exceptions puts women on a par with men." "As regards private rights women are on the same level as men, though postponed in the canons of inheritance; .... We have been speaking of women who are sole, who are spinsters or widows. Women who have husbands are in a different position".[5] In France we find the same thing: "The influence of the Roman Law and the Christian ideas, the disorganization of the family group, the interference of the State within the circle of private interest, brought about the gradual emancipation, here slow, there more rapid, of unmarried women. It is thus that among the Franks we have been justified in asking if as early as the barbarian period the guardianship of women had not disappeared."[6] In Germany traces of this guardianship remained, but were all removed in the nineteenth century.[7] The law of California, as might be expected, does not differ in this respect. There is absolutely no property disqualification against women as such. An unmarried woman or widow has and has had during the entire history of California just the same property rights and other private law rights as a man. The problem, therefore, is not one of equality between the sexes, but the proper adjustment of the property rights between husband and wife. Even in the sphere of husband and wife it cannot be said fairly that on the whole the laws were deliberately made by husbands to take advantage of wives. Injustice there certainly was.

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[4] Huebner, History of Germanic Private Law, Constitutional Legal History Series, p. 61; Brissaud, History of French Private Law, Continental Legal History Series, p. 221, and see Bryce, Marriage and Divorce Select Essays in Anglo-American Legal History, Vol. 3, p. 782.

[5] Pollock and Maitland, History of English Law, Vol. 1, pp. 482, 485; vol. 2, p. 437.

[6] Brissaud, History of French Private Law, Continental Legal History Series, p. 225.

[7] Huebner, History of Germanic Private Law, Continental Legal History Series, p. 68; Progress of Continental Law in the 19th Century, Continental Legal History Series, p. 193.

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> "At the common law, a wife's corporeal chattels passed to her husband absolutely. He could, if he pleased, enforce, or reduce into possession, her choses in action; but, if he did not do so, and predeceased her, they survived to her. By virtue of this doctrine, he could also collect the rents of her lands from the day of the marriage; but he did not obtain a 'real' interest, or estate, in her lands of inheritance, until the birth of issue by her capable of inheriting. On the birth of such issue, however, if the wife were actually seised of a present estate of inheritance, the seisin passed to the husband for his life, under the name of 'tenant by the curtesy.' The wife, from the day of the marriage, ceased to have any contracting power; her contracts, if they were valid at all, were only valid as the contracts of her husband, and he alone (if any one) was liable on them. He was also liable for her ante-nuptial debts, whether he received any property with her, or not; and for her torts committed before or during the marriage. In a word, her legal personality (but not that of her heirs) was merged in his; to such an extent that, though the husband could not affect the inheritance of her land, yet the wife could not dispose of it otherwise than by fine. She had no power at all to make a will without his consent; and he could not even authorize her to make a will of land."[8]

By way of compensation the wife obtained on the death of the husband a life estate in one-third of all the lands of which he had been seised during the marriage. It is evident that much injustice was possible under the English common law.

> "I remember a case some years ago of a sailor who made his will in favor of a woman with whom he cohabited, and afterwards went to the West Indies and married a woman of considerable substance; and it was held, notwithstanding the hardship of the case, that the will swept away from the widow every shilling of the property; for the birth of a child must necessarily concur in order to constitute an implied revocation."[9]

Hard as the case was, it was the logical consequence of what Brissaud characterizes as the absurd logic which organized the entire system of property between spouses as a function of the incapacity of the married woman. This theory was carried to the logical extreme whether it injured the husband or the wife. The husband obtained a power over the wife's property, but he also

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[8] Jenks, Short History of English Law, p. 222; Jones' Blackstone, p. 1300, n.

[9] Lord Ellenborough, in Doe d. White v. Barford (1815) 4 M. & S. 10, 105 Eng. Rep. R. 739.

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became responsible for her debts before marriage. The reader will recall Thackeray's story of the Fatal Boots in the Yellow Plush Papers. The usurious young hero of that romance was wooed and won by a lady reputed to possess the wealth of a Croesus. After the marriage her wealth was discovered to be a negative quantity, consisting entirely of debts and the husband found himself in prison and his entire inheritance swept away to pay her creditors. It is of course familiar that the English courts of equity made it possible to convey property to a married woman so that she might exercise control of it.

> "Let it, however, be noted, that the aim of the Court of Chancery had throughout been not so much to increase the property rights of married women generally, as to enable a person (e.g., a father) who gave to, or settled property upon a woman to ensure that she, even though married, should possess it as her own, and be able to deal with it separately from, and independently of, her husband, who, be it added, was, in the view of equity lawyers, an 'enemy' against whose exorbitant common law rights the Court of Chancery waged constant war."[10]

Further to carry out this protection the control of the married woman over property was limited by means of the clause restraining anticipation.

> "If it was subject to such restraint,she was during coverture unable to exercise the full rights of an owner, but in compensation she was absolutely guarded against the possible exactions or persuasions of her husband, and received a kind of protection which the law of England does not provide for any other person except a married woman."[11]

By modern statutes the English law has come to this practically: that each spouse keeps what he or she has or acquires By custom, however, much of the property which is held by married women is still held by them under conveyances containing the restraint on anticipation. Dower has become nothing more than a right of the widow to succeed to the real property of which the husband dies seised, unless he has made some other disposition of it by will or otherwise. This is a system of pure equality and is very much like the Roman law. By the early Roman law "whatever the wife acquires she acquires for her husband and any property she may have at the time of her marriage

[10] Dicey, Law and Opinion in England, p. 376.
[11] Id., p. 379.

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passes in its entirety (*per universitatem*) to her husband by the necessary operation of law."[12] Under the developed Roman law, however, marriage had in general no effect upon the property rights of the spouses. Each spouse kept and managed the property he or she had at marriage as well as that acquired afterwards. To a certain extent there was a limitation by the duty of the husband to maintain the wife and the custom of making a contribution to the husband (the *dos*). As it finally worked out the husband in the end got nothing more than the right to manage this dotal property and enjoy the profits of it.[13]

In the early German law it is possible to find every conceivable combination. In the early law there was the dowry or marriage portion given with the wife, either by the house of her parents or by the household community to which she belonged; and dower, a gift by the husband to the wife, developed out of the purchase price formerly paid to the family. In course of time the old "morning gift" also became merged with the dower. The husband had the administration of all this property. The later Germanic developments were along the line of two systems, a system without community and a system of community.

In the system without community, known sometimes by the misleading term of "administrative community", better, perhaps, called "administrative union", the property of the wife and husband were separate; what the husband had and acquired was his and what the wife had and acquired was hers, but the whole was subject to the control and administration of the husband. Usually he could dispose of the movables without the wife's consent, but her consent was generally required for the immovables. On death the property was divided according to its ownership.[14] This was a simple system, well adapted to rural conditions where most of the capital was in land. Under urban conditions such a system affords very little protection for the wife, for she gets no rights in the husband's acquisitions, which usually come in the form of movables as a result of commercial activity.[15]

There were also various systems of marital community, differing, however, from the administrative union less than might

[12] Sohm's Institutes of Roman Law, Ledlie (3rd ed.) p. 459.
[13] Id., p. 471.
[14] Huebner, History of Germanic Private Law, Chap. XI.
[15] Id., p. 630.

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be expected. Sometimes all the property at marriage was put in the community, sometimes only a portion. But, as in the administrative union, the husband had the entire administration of this joint property, although as a rule the wife's consent was required to dispose of immovables. On death of one of the spouses the collective estate was divided between the survivor and the heirs of the decedent, the wife receiving one-third or one half, according to the custom of the particular place, and depending in part on whether there were children surviving. The control and power of the wife under this system and her protection were no greater than under the systems without community. The particular advantage, however, was that on the death of the husband she procured a portion of the acquisitions during the marriage.

The modern law of Germany did not attempt to supersede all the diverse and complex systems; the administrative union is assumed if nothing else is agreed on, but other systems are defined and regulated and the parties may make other arrangements by contract. Under the administrative union the wife's property is divided into privileged and non-privileged. The privileged property consists of: "(1) things intended exclusively for the wife's personal use, more particularly clothes, personal ornaments and appliances for the wife's work; (2) property acquired by the wife's work or by any trade carried on by her independently of her husband; (3) property declared to be privileged property by the marriage contract; (4) property given as privileged property by a testator or donor; (5) property acquired by virtue of a right included in the privileged property or by way of substitution for any destroyed, damaged or withdrawn objects previously forming part of the privileged property, or by virtue of any act-in-the-law having reference to the privileged property."[16] All of the wife's property not privileged is put in the non-privileged class. The wife has complete powers of disposition over her privileged property, but as regards the non-privileged the husband is entitled to take possession of it, manage it, and dispose of money or other consumable things. The wife, therefore, has very little control of the non-privileged property, unless the husband consents or in some cases ratifies her act. The husband has the usufruct of the non-privileged property and applies it to the expenses of management of the joint house-

[16] Schuster, The Principles of German Civil Law, p. 500.

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hold. The wife has an action for security to protect her non-privileged property and the husband's creditors have no right against the wife's property, either privileged or non-privileged. At death the survivor takes his property and the next of kin of the deceased spouse receive the decedent's property unless otherwise provided by will.

While the German law has favored the administrative union, the French law extends similar favor to the community system. The community in the French law consists of:

> "1. All the movables which husband and wife possess on the day of their marriage, and also all the movables which they may acquire during marriage, either under a succession or by gift *inter vivos*; unless the donor has expressed a contrary intention.
>
> "2. All the produce, revenues, interest or arrears of every kind which fell due, or have been received during marriage from property which belonged to either husband and wife at the time of their marriage, or from property which they fell into during the marriage, whether as heirs or otherwise.
>
> "3. All the movables purchased during marriage."[17]

The husband has the sole management of the property of the community. He also has the management of all his wife's separate property. At death the survivor and the heirs of the decedent each take out their separate property and the community is divided equally. The parties may change this community system in many ways by contract before marriage, but not by any agreement after. To a limited extent the wife has obtained rights in her earnings.[18]

In the Spanish law the community property of husband and wife consists of:

> "1. All property of whatever nature, which the spouses acquire by their own labor and expense (onerous title). This includes property acquired during the marriage at the expense of the community.
>
> "2. Property acquired jointly in the name of both husband and wife.
>
> "3. The fruits of income of individual property of husband and wife, or of the community property."[19]

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[17] French Civil Code, Blackwood-Wright, § 1401.
[18] Progress of Continental Law in the Nineteenth Century, Continental Legal History Series, p. 209.
[19] Walter Loewy, 1 California Law Review, 39.

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The husband manages the property and on the death of one of the spouses an equal division of the estate takes place between the survivor and the heirs of the deceased spouse. The present law of California is very similar to the Spanish law, differing from it in that the income of separate property in California continues to be separate, and on the death of the wife the entire community property goes to the husband without administration. Subject to some minor exceptions the wife has no vested right in the community property during the marriage. Her interest has been termed inchoate, a mere expectancy, which she takes by succession and not as co-owner.[20]

The proposed amendments to the California law are intended to accomplish three things: (1) to give the wife an equal share in the management and control of the community property; (2) to give her the right to dispose by will of her share of the community property; (3) to give her the entire community property on the death of her husband, unless he has disposed of his half by will.[21] What are the reasons for the change?

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[20] Dargie v. Patterson (1917) 176 Cal. 714, 169 Pac. 1360; Spreckles v. Spreckels (1916) 172 Cal. 775, 158 Pac. 537; Spreckels v. Spreckels (1897) 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 697, 58 Am. St. Rep. 170.

[21] "Section 1. Section one hundred sixty-four of the Civil Code is hereby amended to read as follows:

"164. All other property acquired after marriage by either husband or wife, or both, is community property, and husband and wife have, each, the same and equal right, title and interest in and to such community property. In cases where a married woman has conveyed, or shall hereafter convey, real property which she acquired prior to May 19, 1889, the husband of such married woman, and his heirs and assigns, shall be barred from commencing or maintaining any action to show that said real property was community property, or to recover said real property, unless such action is commenced within one year from and after the filing for record in the recorder's office of the instrument conveying such real property.

"Sec. 2. Section one hundred seventy-two of the Civil Code is hereby amended to read as follows:

"172. Each spouse has the same and equal rights in and to the management, control, conveyance and disposition of the community property; but neither spouse may, without the written consent of the other lease, convey, encumber or dispose, except by testamentary disposition, of only his or her individual interest in the community property, or in any portion thereof, to a third person; and neither spouse shall, without the written consent of the other, have any power to make a gift of any of the community property, or to dispose, except by testamentary disposition of any of the community property without a valuable consideration therefor. Each spouse is presumed to be the agent of the other for the purpose of managing, controlling, conveying or encumbering community personal property which is in his or her immediate possession or control; and this presumption is conclusive in favor of a purchaser, pledgee, or mortgagee, in good faith and for fair value; but neither spouse may, without the written consent of the other, sell, convey or encumber the household furniture used by the family or the wearing

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Would it not be more in accord with the principles of equality between the sexes to adopt the English law of the separation of estates? That is absolute equality or nearly so, the property rights of the spouses continuing just as if they were not married. To bring about this system in California all that would be necessary would be to abolish the present community system and allow the wife to control her own earnings Against this, the proponents of the measure contend that such equality is theoretical, that it does not correspond with the actual condition of things in society; that it might accord with some future state in which married women, after achieving civil and political equality, had also acquired economic equality. But, under conditions as they are at present, most women have very little property when they marry, have very little opportunity to acquire property, and as a rule give up that opportunity in order to maintain a home for the family. Unless, therefore, the wife has an interest in the gains of the husband from his business she has in most cases little chance to acquire any property which she can call her own. The husband must provide the necessities of life, but beyond that anything that the wife gets comes as a favor and not as a right. Her interest is termed a community interest implying that there is a partnership, but it is a partnership which only commences on its termination.[22] The only way in which

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apparel of the minor children or of the spouse not making the sale or encumbrance.

"Both husband and wife must join in the instrument by which community real property, or any interest therein, is leased, sold, transferred, conveyed or encumbered.

"Sec. 3. Section one hundred sixty-seven of the Civil Code is hereby repealed.

"Sec. 4. Section one hundred seventy-two *a* of the Civil Code is hereby repealed."

"Section 1. Section one thousand four hundred one of the Civil Code is hereby amended to read as follows:

"1401. Upon the death of either husband or wife, the community property is distributed as follows, to wit: Subject first to the law regarding homesteads, to the family allowance, to the payment of debts lawfully chargeable against the community property and to the expenses of administration, one-half of the community property goes to the surviving spouse, and the other half is subject to the testamentary disposition of the deceased spouse. In the absence of such disposition by the deceased spouse, the entire community property goes, without administration, to the surviving spouse. Unless a will of the deceased spouse making such disposition is filed for probate within ninety days from and after his or her death, it shall be conclusively presumed that such deceased spouse elected not to exercise such right of testamentary disposition.

"Sec. 2. Section one thousand four hundred two of the Civil Code is hereby repealed."

[22] Garrozi v. Dastas (1907) 204 U. S. 64, 51 L. Ed. 369.

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the wife can enjoy the so-called community property as a matter of right before the death of her husband is to get a divorce.

What then are the objections to a real partnership giving the wife an equal share in the management and control while the partnership continues and an equal interest on dissolution by death? The objections to the proposed bills fall into two classes; the first, the objections to the bills as drafted; these may be cured by amendment. The second objections are inherent in the changes proposed. Objections not likely to arise in practice will not be discussed. It is possible to put a multitude of supposititious cases that have not been provided for, but the same thing can be done with the present law.

Taking up the first class, the principal objections that occur are the following:

1. It is provided that both husband and wife must join in a conveyance of the community property. There is no protection, however, afforded to a bona fide purchaser who might examine the records and find the title vested in a certain man; this man might conceal the fact of his marriage and it might be impossible by any reasonable diligence to ascertain that he was married. Nevertheless the wife could claim her community interest even against the purchaser. This objection could and should be obviated by requiring a recordation of the marriage certificate in the county where the land is situated. Incidentally it should be noted that the proposed amendment continues the language of the 1917 amendment to section 172 of the Civil Code. It requires both husband and wife to join in the instrument by which community real property is leased, etc. This would seem to prevent either spouse from acting by attorney. In other words, for example, if the husband were about to leave the state for a prolonged absence, and desired by power of attorney to enable his wife to sell or mortgage the community real estate in his absence, this could not be accomplished. Both husband and wife must sign the same instrument. Does not this go farther than the protection of the wife requires?

2. The objection is made that section 1469 of the Code of Civil Procedure, providing for administration of estates not exceeding $1500 in value, is repealed. The simple procedure of section 1469 and the limited exemption from the claims of creditors thereby afforded seems desirable. Also, if the husband is to receive the community on the death of the wife by suc-

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cession, section 1469 should be amended to apply in his favor also.

3. It is difficult to ascertain just what rights creditors would have under the proposed bill. According to the language, each spouse is presumed to be the agent of the other for the purpose of managing, controlling, conveying or encumbering community personal property which is in his or her immediate possession or control. But how does this affect ordinary contracts? Suppose either spouse makes a contract to purchase real estate or shares of stock in a corporation. Suppose either spouse goes on a contractor's bond or commits a tort. Assume that in any of the above cases a liability is incurred and judgment obtained against the spouse. What property can be seized on execution? Clearly the separate property of the spouse incurring the liability, and probably, although this is not so clear, not the separate property of the spouse who did not incur the liability. But how about the community property? Is it liable at all, and if so should the spouse not incurring the liability have a claim against the community property to the extent of half the loss? If the measure means that the community should be liable for the debts of each spouse this should be clearly expressed. If the liability of the community is to be limited the limitation should be defined so that creditors may know what property may be taken in satisfaction of a judgment.

4. There is also danger that the separate property of each spouse may be jeopardized by the other. The proposed amendment to section 172 of the Civil Code provides: "Each spouse is presumed to be the agent of the other for the purpose of managing, etc., personal property which is in his or her immediate possession or control." It might be held that within the scope of this limited agency, each spouse, as agent, might bind the other spouse as principal and thereby subject the separate property of the other to liability.

5. Under the proposed law, on the death of one of the spouses intestate, the entire community vests in the survivor without administration. It is open to question whether it is wise to dispense with probate proceedings. It is true that there is no administration at present on the community when the wife dies, but the wife has no creditors who have any claim against the community. Under the proposed legislation, it is true, that there may be creditors of the wife who have claims against the community property, but they will not as a rule be

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numerous. With the husband the case is entirely different. On his death all his obligations are claims against the community. These claims must be established and paid. If disputed an action must be brought. Where there is no administration this action would probably have to be brought against the wife to establish a claim on the community property in her hands. Each action would have to be brought separately. No limit of time other than the general Statute of Limitations is prescribed for bringing such actions. There would be no segregation of the property and no inventory. It is worth consideration whether the simplicity and cheapness in dispensing with administration are not illusory, and whether the rights of creditors and of the widow would not be better protected by the orderly procedure in rem of administration. Furthermore, if there were administration, it would not be necessary to have a conclusive presumption that there is no will, if one is not filed within ninety days after death. That is a rather dangerous provision in the proposed law. It offers a motive strong for the concealment of wills.

Coming to the objections which no amendment can cure and that are inherent in the proposal, the following have been suggested:

1. The sentimental objection that the marriage relation is imperiled. This objection has been made to every change in the property relations of husband and wife. The fears expressed by a learned judge, when the courts of equity created separate property for a married woman are no less unfounded than the gloomy forebodings indulged in in regard to the pending legislation.

> "In the language of Sir Wm. Blackstone: 'By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection and cover she performs everything.' I confess that I love and venerate the primeval notion of that mystical and hallowed union of husband and wife: when 'they twain became one flesh;' when they 'forsook father and mother, and clave to each other' with unreserved confidence. Marriage, in that old fashioned sense, is the purest source of domestic joys, and the firm foundation of social order.
>
> "I bow to the rule, as I find it established; but I lament the complicated and artificial anomalies in the relations of domestic life, which have grown and are still growing out of the practice of marriage settlements. They give to the

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wife the amphibious character of a *feme covert* and a *feme sole*. I view it as an adulteration of that holy union—as a divorce, pro tanto, of the marriage contract. A wife, in the 'independent enjoyment of her separate estate,' armed with distrust of her husband, and shutting out his affections and confidence, by refusing to give her own in mutual exchange, is an object of compassion and disgust. Legal chastity cannot be denied to her; but there is danger that the sacred institution of marriage may degenerate into mere form. It is sometimes, in practice, little more than legalized prostitution; and the parties seem to have no higher objects than sexual intercourse and the sanction of legitimacy for their offspring. If, in the rapid progress of refinement in civilization, it shall be thought expedient to go one step further, and to allow the wife, by ante-nuptial contract, to stipulate for an exemption from personal control over her by the husband, then the *quasi* divorce would be extended one degree further, so as to confer on her the independent enjoyment of the rights and privileges of a kept mistress. But she would have little claim, indeed, to the endearing appellation and character of a wife.

"The new rule, introduced by Sir R. P. Arden and Lord Loughborough and which has been adopted by His Honor, the Chancellor, in this case, will, I think, tend to sever, in some degree, the marriage union; because it not only renders the wife independent of her husband, as to her fortune, but bars him from participation of it, by new and increased impediments; as if he were presumed to be her worst enemy. Now, if matrimony is not safe and desirable, without these trammels, and fences, and reservations and restrictions, I say, marry not at all!"[28]

2. Tremendous injury to the commercial and financial development of California: Business men are in the habit of coming before the legislature when any important matter affecting business is at issue and prophesying the disastrous results which will follow from its enactment. At each session we have seen such legislation passed and business has gone on as usual. We must therefore turn our attention not to general charges that credit will be destroyed, but look to the particular features of the bill which may have that tendency.

3. The proposed legislation gives the wife the powers of a partner in the business of her husband, whereas in most cases she is entirely lacking in business experience and ability. To the marital union is added a commercial partnership. The power

[28] Mr. Justice Platt in Jaques v. Trustees of the Methodist Episcopal Church in New York, et al. (1820) 17 Johns. 548, p. 581 (6 N. Y. C.

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thus given includes necessarily the power to injure the community property. It is highly improbable, however, that this power will be exercised very often for the destruction of the community property. (a) Business after the passage of this law will in the great majority of cases go on just as it has before, the wives who have been satisfied to allow their husbands to run the business will continue to be satisfied. (b) For a long time to come few men will care to rely on the power of a married woman as agent of the community, because the proposed legislation could not have a retroactive effect. It could not therefore affect community property previously acquired, so that anyone who buys personal property from a married woman, relying upon her possession as agent of the community, will be taking the risk that the property had been acquired prior to the passage of the act.[24] It should be noted, however, that the proposed amendment to section 1401 of the Civil Code, prescribing the succession to the community property, affects all community property whenever acquired.

4. A more serious danger is the one that is involved in the bill giving the wife equal rights over the community property with the husband on dissolution by death. As the law stands at present, on the death of the wife the entire community property goes to the husband without administration. On the death of the husband only half the community property goes to the wife; the rest is subject to the husband's testamentary disposition, or, in case of intestacy, goes to the husband's heirs. Under the proposed legislation on the death of either, the entire community goes to the survivor unless the decedent has exercised by will the power to dispose of one half. It is claimed that this will be disastrous to credit, because it will result in the husband's business being broken up on the death of the wife in case she makes a will and thereby deprives her husband of half of his business. To this it may be said: (a) Few banks lend on the good will of a business; they generally provide for sufficient security to protect them if the business should be suddenly dissolved. (b) In many cases the wife leaves the property to the husband anyway or dies intestate. (c) In other cases the property is willed to the children in whom the father is

[24] Spreckels v. Spreckels (1897) 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 697, 58 Am. St. Rep. 170. But see Arnett v. Reade (1911) 220 U. S. 311, 55 L. Ed. 477.

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equally interested, and with whom he would be willing to act in the carrying on of the business. (d) Any man who fears that his business may be broken up by his wife's interference during life or by her testamentary disposition on her death may make a contract with the wife to guard against such a contingency. (e) In large concerns the business is usually incorporated; all that would pass on the death of the wife would be shares of stock; the business would go on just the same.

It is apparent, however, that the proposed legislation does give to the wife, who is usually inexperienced in business, and seldom has the skill and capacity prerequisite for a business partner, the power to destroy the business during her lifetime, and on her death to compel its dissolution by willing away half of it to persons adverse in interest to her husband. This latter danger is especially to be feared where the husband is carrying on a small business on which his living depends, and where it would be impossible to make a livelihood unless he owned the whole. If the proposed legislation passes it will be necessary for a man to be as careful in choosing a wife as in selecting a business partner. There is also a danger to the business partner of a married man, in case the married partner's wife dies. Careful lawyers in drawing partnership articles will doubtless require some renunciation by the wives of their claims, and will provide for some preferred right in the partners to purchase the interest of the wife's legatee. In time there may develop some statutory system whereby the survivor of the community will carry on the business as trustee for himself and the legatees of the deceased spouse.

On the whole the present California law is more favorable to the wife than the other systems considered. It is more favorable than the English in that the wife after the death of the husband receives one half the community. There is a slight disadvantage in that the earnings of the wife in California are subject to the husband's control while she lives with him. The present California law has the same advantage over the prevailing German law that it has over the English. The French law gives the wife a right to her share of the community on dissolution and includes more than the California law allows, for by judicial construction, the wife is allowed to will her share of the community where she does not survive her hus-

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band, which she can not do in California today.[25] But on the other hand the husband has control in France not only of the community but also of the wife's separate property.

Every effort should be made to present the bills in the best possible form. The passage of such important measures affecting the social and family relations should not be influenced by legal technicalities. The fundamental question is whether there is justice in the contention that a married woman is entitled to have an equal control of the property acquired by the business exertions of the spouses during marriage. If this claim is just, is the incidental disturbance to business practice sufficiently serious to make it inexpedient?

A. M. Kidd.

Berkeley, California.

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[25] Professor Freund notes this as a striking example of the judicial development of a code provision by analogy. 65 University of Pennsylvania Law Review, 229.

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EDITORIAL CORRESPONDENCE

San Francisco, Cal.
January 21, 1919.

Editor, California Law Review:

On reading the last number of the "California Law Review", which came out last month, I note that on page 135 it is said:

"The case of Marysville Woolen Mills vs. Smith states the almost universal rule that courts of general jurisdiction, civil or criminal, will not take notice of the ordinances of a municipality, but that such ordinances must be pleaded and proved."

On examination of the case, I find nothing in it which lays down the rule that municipal ordinances must always be pleaded, and on study of the authorities, I find that municipal ordinances need only be pleaded where the cause of action is based entirely on the municipal ordinance. Where the ordinance is only evidentiary, as was apparently the case in the decision cited, it is

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not necessary to plead the ordinance. You will see that this rule is supported by the following cases: Cragg vs. Los Angeles Trust Co., 154 Cal. 663 (See full note on this subject in 16 Am. & Eng. Cas. 1061, 1064); Fresno Traction Co. vs. A. T. & S. Fe Ry. Co., 175 Cal. 358; Lininger vs. San Francisco etc. R. R. Co., 18 Cal. App. 411; and Stadler vs. Pacific Electric Ry. Co., 23 Cal. App. 571.

I am taking the liberty of calling your attention to this matter in view of your invitation in the first number of the 7th volume to readers to communicate such matters to you, when noticed.

Yours truly,
Delger Trowbridge.

Comment on Recent Cases

CORPORATIONS: MEANING OF "CAPITAL STOCK" IN STATUTES.—The case of *Merchants and Insurers Reporting Co. v. Youts*[1] raises the question as to the meaning of the phrase, "capital stock," and its proper use. When used in its true, technical sense it denotes the aggregate of the par value of all the shares of stock at the time of incorporation. It is the amount fixed by the corporate charter to be paid in by the stockholders, either at the time of incorporation or later.[2] It is to be distinguished from the property of the corporation.[3] The latter may be partly composed of franchises, good will and surplus, which are no part of the capital stock,[4] which is fixed in amount by the charter. The value of the property of a corporation fluctuates with its success or failure. Although part or all of the capital stock may have been invested in property and is thus represented by it, a great part of the property of the corporation may have come from other sources.

The capital of a corporation is its actual holdings in property or money on which it conducts its business.[5] The capital may be equal in amount and value to the capital stock but in all probability

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[1] (1918) 27 Cal. App. Dec. 889.

[2] Cook, Corporations, §§ 8, 191. State v. The Morristown Fire Association (1851) 23 N. J. Law 195; Person and Riegel Co. v. Lipps (1907) 219 Pa. 99, 67 Atl. 1081.

[3] State v. The Morristown Fire Association, supra, n. 2; Tennessee v. Whitworth (1885) 117 U. S. 129, 29 L. Ed. 830, 6 Sup. Ct. Rep. 645.

[4] People ex. rel. Union Trust Co. v. Coleman (1891) 126 N. Y. 433, 27 N. E. 818, 12 L. R. A. 762.

[5] Person and Riegel Co. v. Lipps, supra, n. 2.

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it is entirely different. The practice of modern corporations is to name a sum in the charter as capital stock much larger than the actual working capital, but there may also be cases where the actual capital is greater than the capital stock.

There is confusion in the decisions as to the meaning and application of the terms capital and capital stock. In many instances they are taken to be synonymous,[6] while in others they are carefully distinguished.[7] In construing certain taxation statutes the courts have, in order to arrive at the intent of the legislature, construed the term capital stock to mean property,[8] and capital stock has been confounded with shares of stock, though it is clearly not the same.[9] Capital stock belongs to the corporation. It is the amount of money paid in or to be paid in by the stockholders. Shares of stock represent the entire interest of the shareholder in the corporation.

In California the courts have been called upon to construe the phrase capital stock in section 309 of the Civil Code. The established definition which they have always given to it is that it is the actual money, property or other valuable commodity with which the corporation transacts business.[10] In other words, under this section it is held that when the legislature said capital stock it really meant capital. The court recognizes the distinction between capital and capital stock,[11] but seems to regard the two terms as interchangeable.[12]

It seems clear from the provisions of section 309 of the Civil Code that the result arrived at by the court is correct. Its purpose would seem to be to preserve the capital of the corporation intact, for the benefit of creditors and stockholders. Although the prohibition of this section runs in terms only against the directors, it applies equally to the stockholders, depriving them of power to distribute the capital of the corporation except in the manner provided by law.[13] It applies not only to an improper declaration of dividends but to any other unauthorized reduction of the capital.[14] Because of this section, it follows that in California a

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[6] First National Bank v. Durr (1917) 246 Fed. 163.

[7] Christensen v. Eno (1887) 106 N. Y. 97, 12 N. E. 648.

[8] People v. Wemple (1892) 133 N. Y. 323, 31 N. E. 238.

[9] Farrington v. Tennesee (1877) 95 U. S. 679, 24 L. Ed. 558; Hawley v. City of Malden (1913) 232 U. S. 1, 58 L. Ed. 477, 34 Sup. Ct. Rep. 201.

[10] Martin v. Zellerbach (1869) 38 Cal. 300.

[11] Excelsior v. Pierce (1891) 90 Cal. 131, 27 Pac. 44; Burne v. Lee (1909) 156 Cal. 221, 229, 104 Pac. 438; Schulte v. Boulevard etc. Co. (1913) 164 Cal. 464, 129 Pac. 582.

[12] Kohl v. Lilienthal (1889) 81 Cal. 378, 385, 20 Pac. 401, 22 Pac. 689.

[13] Hedges v. Frink (1917) 174 Cal. 552, 163 Pac. 884; Schulte v. Boulevard Gardens Land Co., supra, n. 11; Tapscott v. Mexican Colorado River Land Co. (1908) 153 Cal. 664, 96 Pac. 271. Opinion contra expressed in decision in department in Baldwin v. Miller & Lux (1907) 152 Cal. 454, 92 Pac. 1030, but at rehearing in bank decision turned on a different ground.

[14] Tapscott v. Mexican Colorado River Land Co., supra, n. 13; Schoake v. Eagle etc. Can Co. (1902) 135 Cal. 472, 63 Pac. 1025, 67 Pac. 759.

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corporation cannot as a rule purchase its own stock, though in certain exceptional cases it may be allowed to do so.[15]

Admirable as the effort of the courts to conform the results of statutes to that intended by the legislaure may be, it is regrettable that it has resulted in such a confusion of the terms, "capital," "capital stock," "property" and "shares of stock," as exists in the cases. Each expression has a separate and distinct meaning, and refers to entirely different things. The legislature is the real offender, since in drafting the statutes it uses the terms in such a manner as to force the courts to depart from the ordinary meaning of the words in order to carry out the obvious intent of the law.

P. M.

COURTS MARTIAL: HABEAS CORPUS.—In *United States ex rel. Doughty v. Hunt*[1] a writ of *habeas corpus* issued on behalf of the relator, who was then held imprisoned under sentence of a general court-martial. For the relator it was contended that the evidence had shown him to have been in a "daze" or "stupor" at the time he committed the offense for which the court-martial had tried and convicted him; that this fact was sufficient to raise the issue of mental derangement; and the presence of this issue was sufficient, under the provisions of the Manual for Courts-Martial,[2] to deprive the court of its right further to proceed with the case.

Upon return of the writ it was held by the District Court that the evidence in question did not *ipso facto* raise the issue of mental derangement; and that consequently the release of the relator could not be ordered, for, in the lanugage of the opinion, "a civil court has no power to interfere with the conduct of a court-martial except in a case where that court has exceeded its jurisdiction." And when jurisdiction is established in the beginning, it is not lost "by any mistake in the general conduct of the case," but only upon a showing "that there is some point in the proceedings where the court actually lost entire jurisdiction over the case."

To this enunciation of the rule no novelty attaches, for it has long been an established principle of law that *habeas corpus* can liberate one held to answer by a court-martial only when the jurisdiction of that court-martial can be impugned.[3] Courts-

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[15] Stewart v. Stewart Hotel Co. (1917) 33 Cal. App. 167, 164 Pac. 624.

[1] (December 9, 1918) 254 Fed. 365.

[2] § 219. "Where the existence of mental disease or derangement on the part of the accused, either at the time of trial or at the time of the commission of the alleged wrongful act, becomes an issue in the trial of the case, the court will stop its proceedings and immediately report the fact to the convening authority."

[3] Dynes v. Hoover (1858) 61 U. S. 65, 15 L. Ed. 838; Smith v. Whitney (1886) 116 U. S. 167, 29 L. Ed. 601, 6 Sup. Ct. Rep. 570; Carter v. McClaughry (1901) 183 U. S. 365, 46 L. Ed. 236, 22 Sup. Ct. Rep. 181; Mullan v. United States, (1909) 212 U. S. 516, 53 L. Ed. 632, 29 Sup. Ct. Rep.

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martial form no part of the judiciary of the nation; they are agencies created by Congress in pursuance of its power to make rules for the governance of the land and naval forces[4] to aid the President in the enforcement of order and discipline within the army;[5] and as they pertain to the executive branch of government their proceedings may not be subjected to judicial review.[6] Such proceedings can only be considered collaterally, and collateral consideration extends only to the inquiry whether or not the court-martial did have jurisdiction over the case.[7] The first important question in connection with jurisdiction is, what must be shown to establish jurisdiction in the first instance? Then follows the inquiry as to when a court may be subsequently divested of jurisdiction which it once had.

In the Manual for Courts-Martial[8] the jurisdiction of any particular court-martial is stated to be conditioned upon four indispensable attributes, namely: (1) that it was convened by an officer empowered by statute to appoint it, (2) that the members who sat thereupon were legally competent to do so, (3) that the court possessed statutory authority to try the person arraigned for the offense charged, and (4) that its sentence was in accordance with law. So much is clear. Upon return to a writ of *habeas corpus* issued on behalf of one detained by military authority[9] it is incumbent upon the author of such detention to show affirmatively that the relator is subject to military jurisdiction and held for an offense of which military courts may take cognizance. If the relator is held awaiting trial it must also be shown that the court was properly constituted and appointed, and if he is held under sentence of a court-martial it is requisite in addition to show the legality of the sentence. Absence of such showing under the conditions enumerated is beyond all question

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330; Kirkman v. McClaughry (1908) 160 Fed. 436; Dillingham v. Booker (1908) 163 Fed. 696; Ex parte Rock (1909) 171 Fed. 240; and cases therein cited.

[4] U. S. Const., Art. 1, § 8, Clause 14.

[5] Winthrop, Military Law and Precedents (2nd ed.) p. 53; Davis, Military Law of the United States (3rd ed.) p. 43, n.

[6] The same rule applies also to administrative agencies other than courts-martial exercising judicial or quasi-judicial functions. So held with regard to boards operating under the Selective Draft Law, Angelus v. Sullivan (1917) 246 Fed. 54; Brown v. Spelman (1918) 254 Fed. 215; to examining boards, Meffert v. State Board of Medical Examination (1903) 66 Kan. 710, 72 Pac. 247. So held likewise with regard to decision of administrative officials in the Chinese exclusion cases, United States v. Ju Toy (1905) 198 U. S. 163, 49 L. Ed. 1040, 25 Sup Ct. Rep. 644. But compare in this latter connection United States v. Charlie Dart (1918) 251 Fed. 394.

[7] See cases cited, supra, n. 3.

[8] § 34.

[9] Slightly different considerations from those hereinafter set forth might have application in the existence of a state of martial law. Questions so arising are, however, foreign to the purposes of this note.

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fatal, and release of the person detained will forthwith be ordered.[10]

It is believed, however, that no further showing is necessary. Although the language of the courts as applied to this question is tinged with a faint suggestion of caution,[11] it is submitted that, in the present state of the authorities, the establishment of the four conditions enumerated in the Manual for Courts-Martial is, in and of itself, sufficient to establish the legality of the restraint complained of. It makes no difference that the relator can show the court-martial to have made a "mistake in the general conduct of the case,"[12] or that it was guilty of "error or irregularity,"[13] or that it had acted with "undue severity,"[14] or even that it had pronounced "mistaken rulings in respect to evidence or law."[15]

It is true that there are expressions in certain decisions which suggest that gross irregularity or flagrant departure from established rules of practice might possibly affect the jurisdiction of the court-martial. So it is said in Dynes v. Hoover that persons "belonging to the Army or Navy are not subject to illegal or irresponsible courts-martial, when the law for convening them and directing their proceedings of organization and for trial have been disregarded."[16] And in Mullan v. United States[17] there is an intimation that such irregularity as would work deprivation of the substantial rights of an accused might operate in divestment of jurisdiction. These and kindred expressions are, however, invariably followed by qualifying language, and are authority of very doubtful value, especially in view of the fact that they have never been followed to the point of actually determining a case.

This doubt is further enhanced by consideration of the provisions of the thirty-seventh Article of War, under which the authority reviewing the sentence of a court-martial may find its actions invalid if, "upon examination of the entire proceedings," there be disclosed error or irregularity which "has injuriously

[10] McClaughry v. Deming (1902) 186 U. S. 49, 46 L. Ed. 1049, 22 Sup. Ct. Rep. 786; Carter v. McClaughry (1901) 183 U. S. 365, 394, 46 L. Ed. 236, 22 Sup. Ct. Rep. 181; also cases cited, infra n. 11.

[11] Cf. language of Johnson v. Sayre (1895) 158 U. S. 109, 118, 39 L. Ed. 914, 917, 15 Sup. Ct. Rep. 773, 777: "The court-martial having jurisdiction of the person accused, and of the offense charged, and having acted within the scope of its lawful powers, its decision and sentence cannot be reviewed or set aside by the civil courts by writ of habeas corpus." Passages of identical purport will be found also in Swaim v. United States (1897) 165 U. S. 553, 555, 41 L. Ed. 823, 824, 17 Sup. Ct. Rep. 448, 449; United States v. Praeger (1907) 149 Fed. 474, 485; Mullan v. United States (1908) 212 U. S. 516, 520, 53 L. Ed. 632, 635, 29 Sup. Ct. Rep. 330, 331. Cf. also cases cited, supra, n. 3, 10.

[12] United States v. Hunt (1918) 254 Fed. 365.

[13] Ex parte Reed (1879) 100 U. S. 13, 23, 25 L. Ed. 538, 539.

[14] Swaim v. United States, supra, n. 11.

[15] Dynes v. Hoover, supra, n. 3.

[16] Id.

[17] Supra, n. 11. The court says: "We think there was nothing in the manner in which the court-martial was organized which deprived the accused of a substantial right in such manner as to oust its jurisdiction in the premises."

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affected the substantial rights of an accused." It would seem that a civil court in *habeas corpus* proceedings might collaterally attack the jurisdiction of a court-martial upon showing of irregularity in injury of "substantial rights." The case now under discussion is the only one since 1916—at which time Article of War 37 became in its present form a part of the military code—in which *habeas corpus* has been directed at court-martial proceedings, and in that case no such contention was even advanced.

All these considerations point to the truth of the view previously advanced, namely, that jurisdiction is finally shown by the establishment of the four conditions set forth in the Manual for Courts-Martial, and that irregularity in practice or error in law cannot raise the question again.

It is evident in any event that the civil courts are unable to afford any sort of adequate protection against arbitrary, irregular, or unduly harsh action of courts-martial. Military law likewise fails to afford such protection, for while setting forth many directions and even positive rules designed to serve that end, it provides the most ineffective means of compelling compliance therewith.[18] Some protection the soldier should have, and legislation as a means of securing it to him at least merits the consideration of thinking persons.[19]

E. M. P.

DURESS: FINANCIAL NECESSITY AS AN ELEMENT.—The question of duress as a defense to a contract, where there was involved neither the restraint of the person nor of the goods of the defendants, was presented recently to the District Court of Appeal, in the case of *Tisdale v. Bryant*.[1] The action was for the partition of a tract of land, an undivided one-half interest in which plaintiff claimed under an agreement made while defendants were experiencing financial difficulties. Defendants asserted that plaintiff took advantage of their financial embarrassments to force them into the agreement, and they sought to avoid the agreement on the ground that, because of their financial necessities, it was made under duress. The court held that the facts alleged were not sufficient to constitute duress.

Duress of the person, the only sort mentioned by Blackstone,[2] took the form of imprisonment or violence or threats of imprison-

[18] In this connection cf. the testimony given on February 13, 1919, before the Senate Committee on Military Affairs by Brigadier-General Samuel T. Ansell, Acting Judge Advocate General of the Army. A resume of this testimony is given in the Army and Navy Journal for February 15, 1919, at page 853.

[19] Reforms directed to this end are suggested in the bill introduced by Senator Chamberlain on January 13, 1919, into the Senate Committee on Military Affairs, and in the joint resolution proposed by Senator McKellar on February 18, 1919.

[1] (Nov. 23, 1918) 27 Cal. App. Dec. 692.

[2] 1 Bl. Com., § 178, 1 Jones' Edition, 224.

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ment or violence to the person. It had been a defense to an obligation since Bracton's time.[3] By analogy to duress of the person, the courts began to recognize duress of goods as a defense to a contract. The present state of the law is expressed as follows: "The legal conception of duress, originally so narrow as to apply only to cases of imprisonment or serious violence to the person, or threats of such imprisonment or violence, has gradually expanded under the influence of equity until it is now commonly said to consist of any actual or threatened unlawful exercise of power possessed or believed to be possessed by one party over the person or property of another, from which the latter has no other means of immediate relief than the performing of the required act."[4]

But this expansion has continued even beyond duress of goods. Although no other form of duress has been specifically recognized either by the courts or by text writers, there are cases in which the courts have held duress to be present without threats or violence either to person or property. Such a case was Vyne v. Glenn.[5] There plaintiff was forced into a settlement for a sum less than the amount due him by defendant's interference and threatened interference with the payment of money due plaintiff from other parties. These facts the Supreme Court of Michigan considred sufficient to constitute duress, and plaintiff was allowed to recover the balance due him. As the courts recognized duress of goods from its analogy to duress of the person, so they are coming to recognize this type of duress, where the actual or threatened restraint is upon the rights of the individual. This type may be called duress of rights.

The reason for permitting duress to be set up as a defense to a contract is well stated in the case of Fairbanks v. Snow:[6] ". . . . the ground upon which a contract is voidable for duress is the same as that in the case of fraud; and it is that, whether it springs from a fear or from a belief, the party has been subjected to an improper motive for action."

The application of the principle of duress to the facts of the particular cases has not been easy. It is well settled that when a party threatens or does what he has a right to do, no matter what the effect on the other party, there is no duress. Threatening an action for an accounting during a financial panic,[7] or demanding the winding up of a partnership when the business is failing, did not amount to duress.[8] "In a legal sense a person cannot be said to have taken an undue advantage of another or

[3] Ames, Lectures on Legal History, 113.
[4] Woodward, Quasi Contracts, § 212, p. 337.
[5] (1879) 41 Mich. 112, 1 N. W. 997.
[6] (1887) 145 Mass. 153, 13 N. E. 596.
[7] Morton v. Morris (1896) 72 Fed. 392.
[8] Fuller v. Roberts (1895) 35 Fla. 110, 17 So. 359, 87 Am. Dec. 178.

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to have done any wrong, when he merely threatens to enforce his rights in a civil action in the ordinary form."[9]

The test most often laid down by the courts in cases of this kind is the lawfulness or unlawfulness of the threats or acts charged to amount to duress. "Legal duress implies that a party has been unlawfully constrained by another to perform an act under circumstances which prevent the exercise of free will. The act of the party compelling the unwilling obedience must be unlawful and wrongful; and there can be no duress of goods in law where the act done or threatened is nothing more than what the party had a legal right to do."[10] But just where this line may be drawn depends upon what is meant by an unlawful act. If by an unlawful act is meant a tortious act, this criterion holds. But the mere breach of a contract, although it gives rise to a remedial right, is not such an unlawful act as to constitute duress. The leading case on this subject is Astley v. Reynolds.[11] A pawnbroker refused to deliver plate deposited with him until an unlawful demand for money was paid. This the plaintiff was allowed to recover. In line with this case, the American courts have held duress to exist in the following circumstances: threatening to remove a slave until a falsely claimed debt was paid;[12] attaching and holding oysters until excessive transportation charges were paid;[13] unlawful seizure of goods on high seas and refusal to part with them except at public sale;[14] refusal to deliver land warrants until overcharges were paid;[15] refusal to deliver oats until overcharges were paid;[16] threat to attach property until illegally imposed tax was paid;[17] refusal to surrender logs until illegal boomage was paid;[18] refusal by an express company to deliver goods until an amount greater than that due was paid.[19]

But these cases all involve torts. A mere breach of contract or threat to break a contract has not as yet been held to amount to duress. Such cases often take the form of a refusal to pay money due until some demand has been complied with: making new contracts;[20] paying higher than the contract price;[21] signing new charter-parties with smaller compensation than that originally agreed upon.[22] A promissory note given under a threat to sell a

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[9] Fuller v. Roberts, supra, n. 7.
[10] Morton v. Morris, supra, n. 8.
[11] (1732) 2 Strange, 915, 93 Eng. Rep. R. 939.
[12] Crawford v. Cato (1857) 22 Ga. 594.
[13] Spaids v. Barrett (1870) 57 Ill. 289, 11 Am. Rep. 10.
[14] Sasportas v. Jennings (1795) 1 Bay 470 (S. C.).
[15] White v. Heylman (1859) 34 Pa. St. 142.
[16] Beckwith v. Frisbie (1860) 32 Vt. 559.
[17] Preston v. Boston (1831) 12 Pick. 7 (Mass.).
[18] Chase v. Dwinal (1830) 7 Greenl. 134 (Me.), 20 Am. Dec. 352.
[19] Harmony v. Bingham (1854) 12 N. Y. 98, 62 Am. Dec. 142.
[20] Cable v. Foley (1891) 45 Minn. 421, 47 N. W. 1135.
[21] Goebel v. Linn (1882) 47 Mich. 489, 11 N. W. 284, 41 Am. Rep. 723.
[22] Silliman v. U. S. (1879) 101 U. S. 465, 25 L. Ed. 987, 15 Ct. Cl. 629 25 Sup. Ct. Rep. 987.

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partnership interest to a stranger contrary to a promise was held not given under duress.[23] In Hackley v. Headley,[24] the Michigan court would not allow a recovery by plaintiff after he had given a receipt in full for less than the amount due in order to get an immediate payment. The line at present between cases where recovery is permitted on the ground of duress and where recovery is denied on such ground seems to run between cases where the unlawful demand constitutes a tort and where it constitutes a mere threat to break a contract. The case under review is far from the border. There is nothing to show that plaintiff is responsible for defendant's financial difficulties. Plaintiff neither broke a contract nor committed a tort.

L. B. S.

LANDLORD AND TENANT: WHEN TENANT IS NOT ESTOPPED TO DENY LANDLORD'S TITLE.—In *Hambey v. Wood*[1] the District Court of Appeal affirmed the rule laid down in Tewksbury v. Magraff,[2] and sustained by subsequent decisions in California,[3] that the rule that a tenant is estopped to deny his landlord's title does not apply where the tenant was in possession at the time of taking the lease. The scope of the earlier decisions has, it is true, been somewhat modified by later ones, holding that in actions such as unlawful detainer where title could not be tried the rule does not apply.[4] The tenant indeed, even in such actions, may show actual fraud in the making of the lease,[5] or may show that the landlord's title has expired during the lease.[6] Another limitation on the rule in Tewksbury v. Magraff is that the tenant will not be allowed to dispute the title of the landlord where the lease is given as security for a loan.[7] Another limitation is that production of the lease, whether during its term or after its expiration, makes a *prima facie* case for the landlord and the burden of proof is upon the tenant to prove title in himself.[8]

Even with the modifications mentioned, the California court stands practically alone in its view of this matter.[9] The great weight of authority is that the estoppel is not dependent on whether

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[23] Taylor v. Ford (1901) 131 Cal. 440, 63 Pac. 770.
[24] (1881) 45 Mich. 569, 8 N. W. 511.

[1] (1918) 28 Cal. App. Dec. 5.
[2] (1867) 33 Cal. 237.
[3] Franklin v. Merida (1868) 35 Cal. 558.
[4] Mason v. Wolff (1870) 40 Cal. 246.
[5] Simon Newman Co. v. Lassing (1903) 141 Cal. 174, 74 Pac. 761; Knowles v. Murphy (1895) 107 Cal. 107, 40 Pac. 111.
[6] Teich v. Arms (1907) 5 Cal. App. 475, 90 Pac. 962.
[7] Knowles v. Murphy (1895) 107 Cal. 107, 40 Pac. 111.
[8] De Peralta v. Ginochio (1874) 47 Cal. 459; Hallway v. Galliac (1874) 47 Cal. 474; Abbey Homestead Assoc. v. Willard (1874) 48 Cal. 614.
[9] See 6 American Law Review, 1; Bigelow on Estoppel, 570; 1 Tiffany, Landlord and Tenant, 471 et seq.

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the tenant was in possession when he took the lease,[10] nor on the right by which he was in possession. He may have been a mere trespasser,[11] or in possession under a lease from a third party,[12] or under a claim of ownership in himself,[13] but if he takes a lease he is by the rule generally prevailing outside of California estopped to deny the title of his lessor, though the estoppel possibly may render him liable for rent to two parties.[14]

The estoppel forming the basis of the rule that the tenant may not dispute his landlord's title is not the estoppel by deed with which Coke was so familiar, but an estoppel in pais. It applies because the tenant by taking the lease has caused the landlord to change his position to his detriment. Where the tenant goes into possession under the lease he has clearly gained an advantage of which he should not be allowed to avail himself unless he admits his landlord's right to give the lease. But acquisition of possession should be only one of the elements in such an estoppel. At the time of making the lease the landlord may have been in a much better position to enforce his claims than he would be at a later date, and it is quite possible that the giving of a lease and allowing a tenant to remain in possession might prejudice his rights in other respects. And if his rights are in fact prejudiced or his position changed because of the lease the estoppel should apply whether it arose through the giving of possession to the tenant or otherwise. The tenant is amply protected since if the attornment arose through mistake,[15] fraud or misrepresentation[16] he may dispute the landlord's title and he is only estopped as to the lessor's title at the time of the lease and may show that it has terminated.[17] In case of an assignment by the lessor of the reversion the lessee stands in the same relation to the assignee that he did to the original lessor,[18] but he may show that the transfer of the reversion was void.[19] This is clearly right. The California court would certainly not press its exception so far as to say that the tenant is not estopped as against the

[10] Miller v. Lang (1868) 99 Mass. 13; Bailey v. Kilburn (1845) 10 Met. 176; Bartlett v. Robinson (1897) 52 Neb. 715, 72 N. W. 1053; Wallace v. Ocean etc. Assoc. (1906) 148 Fed. 672; Rankin v. Simpson (1852) 19 Pa. St. 471; Parrot v. Hungelburger (1890) 9 Mont. 526, 24 Pac. 14; Dixon v. Stewart (1893) 113 N. C. 410, 18 S. E. 325.

[11] Campau v. Lafferty (1880) 43 Mich. 429, 5 N. W. 648.

[12] Sturges v. Van Orden (1902) 37 Misc. Rep. 499, 75 N. Y. Supp. 1007; Lucus v. Brooks (1873) 18 Wall. 436, 21 L. Ed. 779.

[13] Bullard v. Hudson (1906) 125 Ga. 393, 54 S. E. 132.

[14] Hamilton v. Pittock (1893) 158 Pa. St. 457, 27 Atl. 1079; Piper v. Cashell (1903) 122 Fed. 614.

[15] Thayer v. Society of United Brethren (1852) 20 Pa. St. 60.

[16] Cross v. Freeman (1898) 19 Tex. Civ. App. 428, 47 S. W. 473; Carter v. Marshall (1874) 72 Ill. 609.

[17] Shields v. Lozear (1869) 34 N. J. Law 496; Jackson v. Rowland (1831) 6 Wend. 666.

[18] Streeter v. Ilsley (1888) 147 Mass. 141, 16 N. E. 776; Smalley v. Mitchell (1896) 110 Mich. 650, 68 N. W. 978.

[19] Ross v. Kernan (1883) 31 Hun 164.

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assignee of the reversion, because he entered not under the assignee but under the assignor, though the logic of Tewksbury v. Magraff, as pointed out by Mr. Willard in his article in the American Law Review, above referred to, leads inexorably to this conclusion. But, notwithstanding the concession in favor of the assignee of the reversion, the California rule does not contemplate the possibility of the lessor changing his position to his disadvantage in any way other than by giving possession to the tenant. This view would seem to be too narrow an application of the principle of equitable estoppel. It would seem entirely possible that the change of position may occur in some other way than by change of possession.

The doctrine of Tewksbury v. Magraff may possibly be the result of a survival from the common law theory of the leasehold interest, long since abandoned in American jurisprudence. Under the view of the common law the lessee before entry had no interest in the land, but the entire estate remained in the lessor until actual possession taken by the lessee. The *interesse termini*, as the lessee's right was called before entry, was something more than a personal right, for it was assignable, but it fell far short of transferring an estate or interest in the land.[20] No reason therefore existed under the common law for applying the principle of estoppel in pais in the case of a right personal rather than real—even had the doctrine of estoppel in pais been developed to the extent to which it has since been carried. May not the California case, decided in 1867 on the authority of earlier American and English cases, have overlooked the fact that since the time when the majority of those cases had been decided, the *interesse termini* had ceased to be and existed only as a specimen in the museum of legal antiquities, for the delectation and instruction of law students? Nowadays the lease itself passes the legal possession, without entry, and this was also the case when Tewksbury v. Magraff was decided.

P. S. M.

MUNICIPAL CORPORATIONS: LIABILITY FOR NEGLIGENCE IN MAINTAINING MUNICIPAL SUMMER CAMP.—In *Kellar* v. *City of Los Angeles et al.*[1] the plaintiff, a minor, attended a summer camp established by the city in the San Bernardino mountains, and while there received personal injuries due to the negligence of those in charge of the camp. He was denied a recovery in damages on the ground that in maintaining this camp the city was exercising a governmental function, as distinguished

[20] On the *interesse termini*, see Tiffany, Real Property, 90.

[1] (Jan. 28, 1919) 57 Cal. Dec. 111. The decision in the District Court of Appeals, which was contrary to that in the Supreme Court, was reported in 27 Cal. App. Dec. 225, and commented on in 6 California Law Review, 457.

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from a private or corporate function, and was therefore not responsible for negligence.

The general principle of liability in this class of cases is plain; its application is frequently difficult. The municipality is a subordinate unit of the state. As such the state delegates to it certain functions of government. These are state functions, though exercised for the state by the municipality, and consequently include only those matters in which the people of the state as a whole may be said to have an interest. Thus the preservation of the peace is a function of the sovereign state, not of the municipality, though the latter hires the police force. The other clearly established instances of governmental functions are the maintenance of the public health,[2] education,[3] relief of the poor,[4] and the prevention of loss by fire.[5] In these matters the sovereign immunity of the state descends upon the municipality and prevents a recovery against it.[6]

For all acts, however, not performed under delegated sovereign power the municipality is liable to the same extent as a private person. These are termed corporate, private or proprietary functions. Common examples are the operation of municipal water systems,[7] electric light and power plants,[8] gas plants,[9] and docks and wharves.[10]

The basis of the principal case is then that the city of Los Angeles, in maintaining this summer camp, was exercising a function belonging primarily to the state, and to the municipality only by delegation from the state. In reaching this conclusion the act is classified as a public health measure.

As might be expected, there are no other cases involving this exact situation. But the case invites comparison with those involving public parks, and was in fact decided on its analogy to those cases. The court adopts the view that the maintenance of public parks is a governmental function, and then reasons that the summer camp is the same in principle and must be governed by the same rule. As to the case of parks, however, there is a decided conflict in the opinions, and the weight of

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[2] Denver v. Maurer (1910) 47 Colo. 209, 106 Pac. 875.
[3] Folk v. Milwaukee (1900) 108 Wis. 359, 84 N. W. 420.
[4] Sherbourne v. Yuba County (1862) 21 Cal. 113.
[5] Howard v. San Francisco (1875) 51 Cal. 52.
[6] This is the all but universal rule. An exceptional decision is Bowden v. Kansas City (1904) 69 Kan. 587, 105 Am. St. Rep. 187, 1 Ann. Cas. 955, 66 L. R. A. 181, 77 Pac. 573, repudiating all distinction between private and governmental functions as far as liability for negligence is concerned, and asserting a right to recover in all cases.
[7] South Pasadena v. Pasadena Land Etc. Co. (1908) 152 Cal. 579, 93 Pac. 490.
[8] Davoust v. City of Alameda (1906) 149 Cal. 69, 9 Ann. Cas. 847, 5 L. R. A. (N. S.) 536, 84 Pac. 760.
[9] San Francisco Gas Co. v. San Francisco (1858) 9 Cal. 453, 469. Per Field, J.
[10] Mersey Docks v. Gibbs (1864) L. R. 1 H. L. 93.

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authority seems to be contrary to the view adopted by the court.[11]

What causes this difference of opinion? The chief cause seems to be the confusion of a limited, local sort of "public" purpose with a truly governmental purpose. Those courts which treat the maintenance of parks as governmental reason that if the act is not done for the purpose of immediate pecuniary returns, but is primarily for the benefit of the citizens of the particular community, it is a "public" function, and then they assume that such a public function is the same as the governmental function which carries with it the immunity of the sovereign.

But the intent to benefit, as opposed to the purpose of pecuniary gain, is not the distinguishing mark of a governmental function. Lighting plants and water systems are frequently operated by the city primarily for the benefit of its citizens, and bring to the public coffers only incidental revenue, if any, but they are nevertheless purely corporate matters. In a much-cited English case[12] the maintenance of a public wash-house, primarily for the benefit of the poorer classes of the city, was held to be a corporate function. And in a recent California case[13] the municipal auditorium of the city of Long Beach, used without charge for all sorts of public gatherings, was considered to be held by the city in its corporate capacity.[14] It was said in this case that the acts of a municipality are private "no matter how beneficial they may be in a general sense to the inhabitants of the community, unless they are governmental in their essence."

Governmental in this sense means connected with the interests of the state at large, not merely with those of the citizens of a particular municipality.[15] The vital connection of police

[11] City of Kokomo v. Loy (1916) 185 Ind. 18, 112 N. E. 994; Pennell v. Mayor etc. of Wilmington (1906) 7 Pennewill (Del.) 229, 78 Atl. 915; Denver v. Spencer (1905) 34 Colo. 270, 82 Pac. 590; Capp v. St. Louis (1913) 251 Mo. 345, 158 S. W. 616, 46 L. R. A. (N. S.) 731, Ann. Cas. 1915 C, 245; City of Anadorko v. Swain (1914) 42 Okl. 741, 142 Pac. 1104; Silverman v. City of New York (1909) 114 N. Y. Supp. 59; Bloom v. Newark (1905) 3 Ohio N. P. (N .S.) 480; Ankenbrand v. Philadelphia (1913) 52 Pa. Super. Ct. 581. Contra: Clark v. Waltham (1880) 128 Mass. 567; Bisbing v. Ashbury Park (1910) 80 N. J. Law 416, 78 Atl. 196, 33 L. R. A. (N. S.) 523; Blair v. Grainger (1902) 24 R. I. 17, 51 Atl. 1042; Russell v. Tacoma (1894) 8 Wash. 156, 35 Pac. 605, 40 Am. St. Rep. 895; Hibberd v. City of Wichita (1916) 98 Kan. 498, 159 Pac. 399; Board of Park Comm'rs v. Prinz (1907) 127 Ky. 460, 105 S. W. 948; Mayor Etc. of Nashville v. Burns (1915) 131 Tenn. 281, 174 S. W. 1111.

[12] Cowley v. Mayor, Etc. of Sunderland (1861) 6 H. & N. 565, 158 Eng. Rep. R. 233. A nominal fee was charged for the use of the wash-house, but the court laid no weight on this circumstance.

[13] Chafor v. City of Long Beach (1917) 174 Cal. 478, 487, 163 Pac. 670.

[14] The collection of rental charges at certain fixed rates was authorized, but it appeared from the evidence that for more than four years it had been the practice to let the auditorium free of charge.

[15] The most frequently quoted passage in this class of cases is that by Judge Dillon containing this statement, "In its proprietary or private

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duties, and those of education, with the interests of the state it is unnecessary to point out. Fire prevention is governmental largely because it protects the property interests, not only of the inhabitants of the city, but of owners everywhere who have property in the city. Poverty may be said to be economically of concern primarily to the state, though the duty of its relief is perhaps less clearly governmental than the other established governmental functions. With respect to public health measures, the majority of cases wherein immunity from tort liability has been recognized have been concerned with negligence in the handling of contagious diseases and epidemics,[16] clearly matters of public concern in the larger sense. But there are also health measures whose significance is primarily local, and there is an evident tendency to distinguish these and to deny to the municipality the immunity of the sovereign in their performance. For example some courts hold the collection and disposition of garbage and refuse to be a matter of merely corporate concern,[17] and the maintenance of a cemetery has been similarly regarded.[18] And the maintenance of sewers is always considered a corporate duty.[19] And so in the case of parks, the courts which hold their maintenance to be a corporate function, while admitting that their purpose is primarily the improvement of the people's health, regard whatever benefit may accrue from them as merely local and corporate, and not public in the full sense necessary to make it a governmental function.

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character, the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the state at large, but for the private advantage of the compact community. * * *" Dillon, Municipal Corporations (5th ed.) § 109. The California court in quoting this passage has said, "The act does not become governmental merely by virtue of the fact that the city from the performance of it reaps no direct pecuniary return. It may be and is equally a private, proprietary act if no financial return at all be exacted. * * * The true principle has too often been confounded with the mere question of pecuniary gain." Chafor v. City of Long Beach, supra n. 13, at p. 483.

[16] See text and citations, Dillon, Municipal Corporations (5th ed.) § 1661.

[17] City of Pass Christian v. Fernandez (1911) 100 Miss. 76, 56 So. 329; Denver v. Porter (1903) 126 Fed. 288; Quill v. New York (1899) 36 App. Div. 476, 55 N. Y. Supp. 889; Ostrom v. San Antonio (1901) 94 Tex. 523, 62 S. W. 909. Where the negligence amounts also to a nuisance the city is always held liable. Nashville v. Mason (1917) 137 Tenn. 169, 192 S. W. 915, L. R. A. 1917D, 914; Denver v. Davis (1906) 37 Colo. 370, 86 Pac. 1027, 6 L. R. A. (N. S.) 1013. But see Love v. Atlanta (1894) 95 Ga. 129, 51 Am. St. Rep. 64, 22 S. E. 29; Kuehn v. Milwaukee (1896) 92 Wis. 263, 65 N. W. 1030; Condict v. Jersey City (1884) 46 N. J. L. 157; Haley v. Boston (1906) 191 Mass. 291, 77 N. E. 888. And in Brunson v. Santa Monica (1915) 27 Cal. App. 89, 148 Pac. 950, a demurrer was sustained without even a statement in the complaint of the purpose for which a city dump was maintained.

[18] Hollman v. City of Platteville (1898) 101 Wis. 94, 76 N. W. 1119, 70 Am. St. Rep. 899.

[19] McQuillan, Municipal Corporations, § 2695. Dillon, Municipal Corporations (5th ed.) § 1739, et seq.

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It is said that the municipality must be granted a wide discretion in deciding what is a public health measure. This is indeed true regarding the city's authority to enact the measure. It does not follow that its immunity from liability for admitted negligence is to be measured with equal liberality. To extend it thus is to bring it in conflict with the plain rule of policy that this principle of immunity, which countenances a wrong without a remedy, should be confined strictly to its established limits.

The difference, if any, between a municipal summer camp and a city park, is a difference of degree. While possibly the former is more truly connected with the welfare of the state at large than the latter,[20] in any event it marks the extreme limit to which the doctrine of sovereign immunity should be carried.[21]

A. R. R.

PROPERTY: LANDLORD AND TENANT: RIGHTS OF LESSOR AGAINST THIRD PARTY PROMISING LESSEE TO PAY RENT TO THE LANDLORD.—The case of *Erickson* v. *Rhee et al*[1] presented an interesting and important situation in the law of landlord and tenant. The landlord or lessor, Erickson, demised the premises to the lessee, Rhee, for three years. The latter then entered into an agreement with Siller Bros. in which it was provided that Rhee was to plant and harvest a crop of rice on 87 acres of the land "in accordance with instructions of Siller Bros." who promised Rhee "to pay the owner of said land the sum of $3.34 per acre for each acre planted to rice and used in the cultivation thereof." Under such an arrangement what were Erickson's rights against Siller Bros.?

Were it possible to construe the transaction as constituting an assignment of the lease from the lessee to Siller Bros. there would be no difficulty in allowing the plaintiff landowner to proceed directly against the new tenant for his rent without going beyond principles uniformly accepted in the law of contracts and of landlord and tenant.[2] There seems no doubt, however, but that the Court was correct in finding that the situation was not one involving an assignment.[3] Whether the relation

[20] If all of the children of the congested districts of the state could have a yearly vacation in the country a noticeable effect upon the general public health might result.

[21] No mention has been made of the fact that a charge of three dollars and seventy-five cents a week was imposed in the principal case. This is more than nominal, but small enough to negative the idea that the camp was undertaken for profit. As indicated above, the only effect of a pecuniary charge upon the principle involved is to furnish evidence of the purpose with which the act was done. See supra, n. 15.

[1] (Dec. 12, 1918) 27 Cal. App. Dec. 832.

[2] Note 52, L. R. A. (N. S.) 968, 979; Cal. Civ. Code, § 822; Salisbury v. Shirley (1884) 66 Cal. 223, 5 Pac. 104.

[3] Tiffany, Landlord and Tenant, § 151.

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created was one of sub-tenancy, as found by the court, is doubtful but unimportant, for the important fact was Siller Bros. promise to pay rent. Starting with the assumption that the relation was one of lessor and sub-lessee a real difficulty arises, for "there is no privity of estate between the sub-tenant and the lessor, and as there is no privity of contract, the former is not liable to the latter for rent."[4] The early cases found the difficulty insuperable, and even though the sub-lessee made an express covenant to pay rent to the landlord the latter had no right of action on the promise.[5] Such, too, is the law in many jurisdictions today.[6] It is evident, therefore, that if recovery may be had that it must be on broad principles in no way peculiar to the law of landlord and tenant.

The court finally rests the case on what has really proved to be the solution in many jurisdictions—the doctrine of a third party's right to sue on a contract made for his benefit. This doctrine is recognized in California,[7] though "there is probably as much confusion in the judicial holdings in respect to the matter as on any question of law that can be mentioned." The doctrine has been applied so as to permit an action by a creditor against one who has agreed with a debtor to assume the debt;[8] against the grantee of a mortgagor by the mortgagee;[9] against the grantee of any property who agreed to assume debts of his grantor as part of the purchase price;[10] and in several cases a sub-tenant who promised to pay rent to the landowner has been held liable to an action by the owner on the same broad doctrine.[11] Some states have narrowed the application of the principle slightly,[12] but the general tendency has been to extend it. In California the principle has been applied in favor of a manufacturer against a sub-vendee on a promise not to sell below a minimum price;[13] of a broker on mutual promises between persons exchanging land to pay a commission to the broker;[14] of the holder of a note against the vendee of corporate stock from

[4] Id. §§ 162, 181 (d); 52 L. R. A. (N. S.) 968, 976 n.; Ann. Cas. 1916E, 788, 823.

[5] Derby v. Taylor (1801) 1 East. 502, 102 Eng. Rep. R. 193.

[6] 16 R. C. L. 881, § 385. Right of action depends on existence of doctrine of third party's right to sue on a contract.

[7] Cal. Civ. Code, § 1559.

[8] See notes, 25 L. R. A. 257-280; 2 L. R. A. (N. S.) 783.

[9] Enos v. Sanger (1897) 96 Wis. 150, 70 N. W. 1069, 37 L. R. A. 862; McDonald v. Finseth (1915) 32 N. D. 400, 155 N. W. 863; Cockrell v. Poe (Wash., 1918) 171 Pac. 522.

[10] Montgomery v. Dorn (1914) 25 Cal. App. 666, 145 Pac. 148.

[11] Brewer v. Dyer (1851) 7 Cush. 337; Borell v. Newell (1870) 3 Daly (N. Y.) 233 (this is only a superior court decision); Foucar v. Holberg (1908) 85 Ark. 59, 107 S. W. 172.

[12] Massachusetts has perhaps retracted to some extent the doctrine of Brewer v. Dyer in its broadest sense, Dunlap v. Bullard (1881) 131 Mass. 161.

[13] Ghirardelli Co. v. Hunsicker (1912) 164 Cal. 355, 128 Pac. 1041.

[14] Lundeen v. Nowlin (1912) 20 Cal. App. 415, 129 Pac. 474.

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the maker of the note, the promise to pay being part of the consideration;[15] and of a creditor of a mining corporation against a vendee of the latter that assumed its debts.[16] Section 1559 of the Civil Code by its terms does not apply where an agreement is not made expressly for the benefit of a party, and the Supreme Court has held that the rule does not apply if a party would be merely incidentally benefited were the agreement carried out.[17] Just where the line is to be drawn between third parties for whose benefit a contract is expressly made and third parties but incidentally benefited, is a difficult question to settle. In fact the cases are rare, except in instances of express trusts, where the purpose of the parties is not to benefit themselves. The third party is usually brought in only as a means of settling accounts between the immediate parties. Although the California Supreme Court in a well known case refused recovery by a third party on a contract which he claimed was made for his benefit,[18] on the ground that there was as to plaintiff only an incidental benefit, on a second appeal of the same case the Court did allow recovery on the theory of a trust.[19] The principal case seems to have presented the question of the lessor and tenant in this state for the first time. In such a case, however, there would seem to be no question but that the contract is expressly for the lessor's benefit when the sub-lessee or promisor, as in the principal case, promises expressly to pay rent to the landlord.

The finding of the court in favor of plaintiff accords with one's sense of justice and seems to do no violence to section 1559 of the Civil Code. It has behind it, too, decisions of other states which accept the doctrine of contracts for a third party's benefit. A great number, however, do not accept the doctrine and in such states the landowner, of course, has no action.[20] There is undoubtedly some objection from a strictly logical point of view in allowing a contractual action where in a technical sense no privity exists, but as a practical proposition and as a matter of justice why should the promisor complain about carrying out his agreement? The principal case seems to reach a desirable result without violating fixed rules of law when viewed from the point of view of a contract for the benefit of a third party.

In several of the states statutes have been passed for the protection of the landowner in cases like that presented in the

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[15] Montgomery v. Dorn, supra, n. 17.

[16] Washer v. Independent Mining Co. (1904) 142 Cal. 702, 76 Pac. 654.

[17] Chung Kee v. Davidson (1887) 73 Cal. 522, 15 Pac. 100.

[18] Supra, n. 17.

[19] (1894) 102 Cal. 188, 36 Pac. 519.

[20] Supra, n. 15.

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principal case. Thus statutes provide that he shall have a lien upon the crops grown on the land by any party in possession.[21]

D. J. W.

PROPERTY: ADVERSE POSSESSION: ADMISSION OF TITLE IN ANOTHER.—In the recent case of *Mills v. Laing*,[1] the court was of the opinion that one of the essential elements necessary to create an effective title by adverse possession, namely "hostile" possession, was lacking and accordingly that the defendant had not acquired such a title to the land in controversy.

It is elementary that the term "hostile possession" does not contain any idea of animus or ill will toward any one.[2] It merely means exclusive possession; possession plus a claim of right which the claimant asserts is subordinate to no other claim.[3] It was contended in the principal case, and the contention was upheld by the court, that the defendant by saying that title was in another, had admitted that she was holding under that other. But does that necessarily follow? In a large percentage of cases of adverse possession, the claimant knows that title is in another, though he does not always know who that other is. In many cases of ouster, it is self-evident that the disseisor knows that the disseisee has a better legal right to the land than he has. Yet does this prevent him from acquiring the land by adverse possession? The very essence of the idea of adverse possession is that the claimant, while he may recognize that the legal title is in another (though this is not necessary) still holds the land as his own and in opposition, but not subordinate, to the title to which his possession is alleged to be adverse.[4] Of course, the moment the claimant admits that he holds the land as tenant of another, or as licensee of another, or by his permission, or in any way subject to another's title, his claim is no longer adverse to that other; he is then simply holding the land under the other party, as his tenant, licensee, or by his permission.[5] And in such a case the statute cannot run in his favor against the one whom the claimant admits he is holding under. As the court said in the principal case, any evidence of the recognition of the title of another is always admissible to show the real character of the possession.[6] And even if a declaration be made by the claimant after the statutory period has expired, such declaration may be admissible as bearing on

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[21] Alabama, Arkansas and Iowa are among the states allowing a lien on the crops regardless of who is in possession. See note, Ann. Cas. 1916E, 826.

[1] 27 Cal. App. Dec. 717.

[2] Ballard v. Hansen (1892) 33 Neb. 861, 51 N. W. 295.

[3] Long v. Mast (1849) 11 Pa. St. 189.

[4] Supra, n. 3.

[5] Angell, Limitations, § 384.

[6] Dillon v. Center (1886) 68 Cal. 561, 10 Pac. 176.

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the question whether the claimant's possession was in fact hostile.[7]

It must be admitted that not a few expressions scattered through text-books seem to strengthen the proposition that mere declarations disclaiming title may defeat acquisition of title by adverse possession.[8] And there is a considerable number of cases in various jurisdictions, including our own, which have, by their language, seemingly adopted that proposition.[9] No attempt is here being made to reconcile the irreconcilable. But it would seem clear that a mere admission that another has the legal title is not an admission that one's claim is subordinate to the holder of that legal title.[10] Whatever the defendant in the principal case acknowledged, whatever she said by way of acknowledgment, she still maintained her possession. It was the possession which, if unlawful, wronged the other, not the motive or belief of the possessor.[11] Where one knows that another claims and is enjoying what belongs to him, and neglects without excuse to prosecute his claim, he will be barred by the statute.[12] Any other result "subordinates the plain letter of positive law to a fanciful effect of motive or belief on the part of the adverse claimant."[13]

H. S. J.

TRADEMARKS: RELATION OF TRADEMARK INFRINGEMENT TO THE LAW OF UNFAIR COMPETITION.—There are few clearer or more interesting examples of the influence of equitable principles upon the common law than that shown in the change in the American law respecting property rights in trademarks. When one man infringed the trademark of another it used to be said that the latter had a property right "in the trademark" which the former had violated, and for which violation he must answer in damages.[1] It followed as a consequence that if the trademark was property at all it was property everywhere, and that "the manufacturer who has adopted and used a trademark has the same right in it at New York or San Francisco that he had at

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[7] Jones v. Williams (1896) 108 Ala. 282, 19 So. 317.

[8] "Third. The continuity of possession may be broken by a recognition of the owner's title during the period that the statute was running." 2 Wood, Lim. (4th ed.) p. 1309. But the author after giving the variety of modes in which such recognition may be accomplished, adds, "or in any way which admits the superiority of the owner's title, and that the occupant holds under, for, or in subservience to him."

[9] Dill v. Westbrook (1910) 226 Pa. 217, 75 Atl. 252. See dictum in McCracken v. San Francisco (1860) 16 Cal. 591 (cited in the principal case).

[10] McAllister v. Hartzell (1899) 60 Ohio St. 69, 53 N. E. 715.

[11] Supra, n. 10; French v. Pearce, 8 Conn. 439, 21 Am. Dec. 680.

[12] Drayton v. Marshall (1839) 1 Rice Eq. (S. C.) 373, 33 Am. Dec. 84.

[13] Supra, n. 10.

[1] Derringer v. Plate (1865) 29 Cal. 292.

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his place of manufacture."[2] It followed as a further consequence that the good faith of the subsequent adopter was no defense, even though he might be doing business in a distant locality to which the prior appropriator had never extended his trade.[3]

This conception of a trademark as being, in itself, legal property arose independently of, and prior to, the doctrine of unfair competition, a development of equity which is stated fully and with entire accuracy in the words of Lord Halsbury: "Nobody has any right to represent his goods as the goods of somebody else."[4]

As the law of unfair competition developed it became evident that, whether a defendant had imitated the plaintiff's trademark or had stolen some of the good will of his business in any other way, as by copying the style of his packages or the architecture of his store front, the damage suffered by the plaintiff was identical in kind, namely a diminution of his business due to defendant's trading on his reputation.

This identity of result once perceived, the subject of property rights in trademark cases was seen to be, not the trademark itself, but the good will of the plaintiff's business. The right to the advantage of the reputation of one's goods is clearly property,[5] and in all the cases this is really the only property which suffers by the defendant's act.[6]

The acceptance of this theory leads to the result, greatly to be desired, that a person who in good faith has built up a valuable business under a certain trademark is not to be deprived of his right to use it by the fact that another person in a distant locality happened upon the same mark first. For the right to the trademark, being but an element of the general right not to have the fruits of the reputation of one's goods stolen, can clearly not exist outside of the territory to which that reputation has been extended.

The United States Supreme Court first clearly stated and

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[2] Derringer v. Plate, supra, n. 1. See also Kidd v. Johnson (1879) 100 U. S. 617, 25 L. Ed. 769.

[3] Hygeia Water Co. v. Consolidated Ice Co. (1906) 144 Fed. 139, affirmed 151 Fed. 10.

[4] Reddaway v. Banham, L. R. (1896) A. C. 199, 204.

[5] American Washboard Co. v. Saginaw Mfg. Co. (1900) 103 Fed. 281, 50 L. R. A. 609.

[6] "The relief the courts give now does not, as formerly, rest on the theory that the plaintiff has property in his mark or name or business, but on the broad general principle that one person shall not by the use of any mark, symbol, device or name, or in any other way pass off his goods as those of another." Nims on Unfair Business Competition, p. 13.

"The courts, at first inclined to develop the law along narrow and technical lines have come to see more and more clearly the fundamental principles upon which to act in extending this protection of the law to the achievements of business. . . . . The law of trademarks is disappearing in a broader principle which prohibits unfair trade." W. K. Townsend, "Two Centuries Growth of American Law," by the faculty of the Yale Law School, p. 436.

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applied this doctrine in 1915.[7] Then the court said, "The common law of trademarks is but a part of the broader law of unfair competition. . . . . Common law trademarks, and the right to their exclusive use, are of course to be classed among property rights, but only in the sense that a man's right to the continued enjoyment of his trade reputation and the good will that flows from it, free from unwarranted interference by others, is a property right, for the protection of which a trademark is an instrumentality."[8]

This decision has been followed by the same tribunal in *United Drug Co. v. Theodore Rectanus Company*.[9] There a party originating and using the trademark in Kentucky was held entitled to the use thereof as against a firm making a prior use of the same mark in New England, upon the subsequent extension of its trade by the latter into Kentucky. The court says, "There is no such thing as property in a trademark except as a right appurtenant to the established business or trade in connection with which the mark is employed." These two cases, in identifying the law of trademarks with the simple doctrines of unfair competition, have rendered a noteworthy service to American law.[10]

The rule adopted by the Supreme Court has found no expression as yet in the decisions of this state. In all the California cases where trademarks have been held to be infringed, the plaintiff seems to have been the first in the particular field as to which the controversy arose.[11] The dicta opposed to the rule

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[7] Hanover Star Milling Co. v. Metcalf (1915) 240 U. S. 403, 60 L. Ed. 713, 36 Sup. Ct. Rep. 357.

[8] Mr. Justice Holmes was unable to assent to the reasoning of the court. He emphasized first the fact that the question is one of state law, and expressed the opinion that the right to the trademark is co-extensive with the "jurisdiction originating the right," illustrating by saying that a trademark used only in Chicago is good all over Illinois. This clearly adheres to the old concepton of a trademark as a right in gross, rejected by the rest of the court.

[9] (Dec. 9, 1918) 39 Sup. Ct. Rep. 48.

[10] It should be added that neither of these cases depends upon federal or state trademark statutes. Congress can legislate concerning trademarks only in connection with interstate commerce. Trademark Cases (1879) 100 U. S. 82, 25 L. Ed. 550. The present act of Feb. 20, 1905, applies only where the infringing mark is used in interstate commerce. 33 U. S. Stats. L. 728, Sec. 16. In other cases the law of the state where the infringement takes place applies.

[11] Woodward v. Lazar (1863) 21 Cal. 448, 82 Am. Dec. 751; Derringer v. Plate, supra, n. 1; Pierce v. Guittard (1885) 68 Cal. 68, 58 Am. Rep. 1, 8 Pac. 645; Sperry & Co. v. Percival Milling Co. (1889) 81 Cal. 252, 22 Pac. 362; Spieker v. Lash (1894) 102 Cal. 38, 32 Pac. 362; Hainque v. Cyclops Iron Works (1902) 136 Cal. 351, 68 Pac. 1014; Banzhaf v. Chase (1907) 150 Cal. 180, 88 Pac. 704.

In the leading case of Derringer v. Plate, supra, n. 1, while it appears very clearly from the opinion that the decision would have been the same had the offending pistol maker been actually first in the market in California, the facts show that Derringer had already been doing business in California. Indeed, anyone at all familiar with early San Francisco

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are found in early cases, decided before the full recognition of the law of unfair competition, and are apparently confined to the expressions of a single judge.[12] There are also certain code sections which bear upon the question. Section 3199 of the Political Code provides that any person who has first adopted and used a trademark or name, whether within or beyond the limits of this state, is its original owner.[13] The Civil Code enumerates trademarks among things which may be the subject of property.[14] Should the situation which arose in the principal case arise in California, and should a person employ in good faith a trademark previously adopted in some other locality, it would probably be contended that the code sections establish in the prior appropriator a right in gross to his trademark, in advance of the actual extension of his trade. But the primary purpose of section 3199 of the Political Code appears to be to limit the effect of the two sections which precede it. These provide that any person may record any trademark, that the Secretary of State shall keep a public record of such marks, and refuse to accept infringing marks. Section 3199 negatives the possible inference that a person might secure the right to use another's mark by being the first to record it. The section makes prior adoption and use, not prior recordation, the basis of the right. And as for Section 655 of the Civil Code, it need only be said that trademarks are property in the sense that they are an element of business good will, though in no other sense. It seems that there is no real obstacle in California to the acceptance of the advanced doctrine adopted by the United States Supreme Court.

A. R. R.

WILLS: THE SUFFICIENCY OF A LETTER AS AN OLOGRAPHIC WILL.—In the *Estate of Dexter*,[1] the document admitted to probate as a will was as follows:

"Woodland, May 9, 1904.

"I have stated to you before that I wish you to administer on my estate, when it has to be. So will put it in writing.

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history will recall many scenes wherein his deadly and easily concealed weapon played a part.

[12] See the quotation from the decision of Mr. Justice Rhodes in Derringer v. Plate, supra, n. 1, and also his expressions in Burke v. Cassin (1873) 45 Cal. 467, 479.

[13] Between 1872 and 1885 section 3199 contained also a further requirement that the mark be recorded with the Secretary of State. See Whittier v. Dietz (1884) 66 Cal. 78, 4 Pac. 965. This requirement was not in force prior to the code. Cal. Stats. 1863, p. 157. It was abolished by amendment. Cal. Stats. 1885, p. 94.

[14] Cal. Civ. Code, § 655. See also § 991.

[1] (1918) 56 Cal. Dec. 446. See prior notes on the general subject in 5 California Law Review, 266, 354 and 503, and article by Nat Schmulowitz, The Execution of Wills in California, 5 California Law Review, 377, 452.

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Distributed equally among my nieces and nephews. You receive your pay besides out of the estate.

"Your Aunt, Mrs. H. W. Dexter.

"To
Charles H. Wright."

This writing was in the form of an addendum written upon a sheet of paper upon which Mrs. Dexter had, on May 8, 1904, written a letter referring to matters of family interest, and the fact that she was about to go on a visit for some length of time. On appeal, it was held properly admitted to probate as the last will and testament of the writer.

One question in every letter propounded as a will is, what was the intention of the deceased in giving expression to the language employed in the instrument, and this should be ascertained by a consideration of the whole document in the light of the circumstances under which it was written. Considering the terms of this letter, it is evident that it was prepared in view of her possible death; the words, "when it has to be," show this.

The case though itself perfectly clear suggests the general question as to what is sufficient to constitute a letter a will. The general rule seems to be that any instrument, executed with the formalities of a will, no matter in what form, if revocable by the maker, and not to take effect until his death, may be construed as testamentary and admitted to probate, especially if shown to have been intended by him to have that character.[2] It is not necessary for the writer to know that the paper which he writes will fully accomplish his purposes. It is sufficient that he manifest his wish that, on his death, his property, or some part of it, shall go to another person by him designated.[3]

We rarely find a letter attested,[4] but the usual form that it takes when it acts as a will is that of an olographic will. It is essential to its validity as such that the requirements prescribed by statute shall be complied with; that is, it must be "entirely written, dated and signed by the hand of the testator himself."[5] If not, the will is void, no matter how clearly it conveys the wishes of the decedent. The privilege of making testamentary disposition of property is not an inherent or even a constitutional right but wholly statutory; and since the legislature has seen fit to impose certain requirements looking to the execution of a

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[2] 41 L. R. A. (N. S.) 40; Cachard, The Code Civil, § 895.

[3] Appeal of Knox (1890) 131 Pa. St. 220, 18 Atl. 1021; Outlaw v. Hurdle (1853) 46 N. C. 147; Webster v. Lowe (1899) 107 Ky. 293, 53 S. W. 1030; Clarke v. Ransom (1875) 50 Cal. 595; In re Anderson (1916) 173 Cal. 235, 159 Pac. 426; In re Keith (1916) 173 Cal. 276, 159 Pac. 705; the Code Civil, § 967.

[4] Boyd v. Boyd (1833) 6 Gill & J. (Md.) 25; Cowley v. Knapp (1880) 42 N. J. Law 297; Gibson v. Van Syckle (1882) 47 Mich. 439, 11 N. W. 261.

[5] The Code Civil, § 970; Cal. Civ. Code, § 1277; Estate of Kustel (1884) 2 Coff. Prob. Dec. 1.

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will, compliance with these exactions is absolutely necessary to the validity of any instrument offered as a testament.[6] The other tests are revocability, postponement of effect and testamentary intent.[7] Is this the will of the testator? That is all that a court of probate has to determine and it does this, as shown, from the surrounding circumstances and the face of the instrument.[8]

The modern olographic will arose in northern France but was later extended to all France by the Code Civil.[9] Through its recognition by the Code Napoleon it has influenced the law of other countries. It is recognized in fifteen of the states of this country, in Porto Rico and the Philippine Islands.[10] It was first permitted in California by the Civil Code of 1872, the provisions being adopted from the civil law.[11] Since its origin is French, the provisions of the French law on the subject are important in matters of interpretation. The decisions under the Statute of Louisiana with reference to olographic wills, which is itself based on the French *droit civil,* and which is similar to our own, are to the effect that the omission of any one of the requirements is fatal.[12]

Bigot-Préameneu and Pothier thought that the will made by a letter formed a distinct form of olographic will and was prohibited as the Ordinance of 1735 upon which are based the provisions of the Code Civil provides for three kinds of wills only—the olographic will, the public instrument and the mystic form of will.[13] Laurent says this is wrong: a letter written, dated and signed by the hand of him who has made a disposition *"à cause de mort"* is an olographic will and valid as such. True, it was prohibited by the Ordinance of 1735, but the French Code does not reproduce this defense. This was because the Ordinance did not consider the disposition contained in a letter as serious. Today the matter is left to the judge, that is, he is to examine the letter and if it contains a serious and definite disposition, it is to be admitted as a will.[14]

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[6] Estate of Carpenter (1916) 172 Cal. 268, 156 Pac. 464; In re Walker (1895) 110 Cal. 387, 390, 42 Pac. 815, 52 Am. St. Rep. 104; Estate of Price (1910) 14 Cal. App. 462, 463, 112 Pac. 482.

[7] Estate of Branick (1916) 172 Cal. 482, 157 Pac. 238; Estate of Meade (1897) 118 Cal. 428, 50 Pac. 541, 62 Am. St. Rep. 244; In re Richardson (1892) 94 Cal. 63, 29 Pac. 484, 15 L. R. A. 635.

[8] Clarke v. Ransom, supra, n. 3; Estate of Wood (1868) 36 Cal. 75; Estate of Dexter, supra, n. 1.

[9] 28 Yale Law Journal, 72 (Nov., 1918); Planiol, "Le Droit Civil," Tome 3, p. 660.

[10] Yale Law Journal, Nov., 1918, p. 76, notes, 23, 25; Porto Rico C. C., § 696; Philippine C. C., § 688.

[11] Estate of Zeile (1910) 5 Coff. Prob. Dec. 292.

[12] Estate of Vance (1916) 174 Cal. 122, 162 Pac. 103; Cal. Civ. Code, § 1277; Cachard, The Code Civil, § 970; La. Civ. Code, § 1588.

[13] F. Laurent, "Principes de Droit Civil," Tome 13, p. 189; M. Bugnet, "Oeuvres de Pothier," Tome 8, p. 228.

[14] M. Bugnet, id., p. 403.

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The particular form, then, of an instrument intended to be testamentary is immaterial. This is true in both France and the United States.[15] Informal papers have been declared sufficient by our courts as wills and admitted to probate.[16] Also, instruments in the form of deeds or contracts have often been considered testamentary, and the statutory formalities of execution required for this validity. In such instances, in order that they may operate as dispositions, probate is necessary.[17] A last will and testament in the form of a letter is, therefore, valid, if either by virtue of the indulgence given to olographic wills or by sufficient attestation, the necessary proof of execution can be supplied.[18] In France, it has been settled that a letter complying with the code may be an olographic will in favor of the one to whom it is addressed. The letter to have such effect must show that the author wished to make a will and that his letter contains a definite intention on the part of the author to dispose of all or a part of his goods, such disposition to take effect after his death. It must be a present disposition, not an expression of intent to make a disposition; nor is a statement that he has already made a will a compliance with the required formalities, even though he then refer to it very positively.[19]

The first requisite under the French Code Civil, section 970, the Louisiana Civil Code, section 1588, and the California Civil Code, section 1277, is that the will shall be wholly written by the testator. In order to make an olographic will, the testator must know how to write; the French jurists hold that one word written by a strange hand makes it void.[20] This is true even when this word would be superfluous in the will; for no one could then say it was entirely written by the testator, which is an essential of this will.[21] It is likewise void, in France, if a third person has guided the hand of the testator to form the letters.[22] One may, however, ask another to write a form of will and by copying it, appropriate it to himself. But even here, he must understand what he writes. To do this, he must be able to read.[23] Planiol and Laurent maintain that if the third person renders simple material assistance to the

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[15] Arendt v. Arendt (1906) 80 Ark. 204, 96 S. W. 982; Clarke v. Ransom, supra, n. 3; F. Labori, "Repertoire de Droit Francais, Tome 12, p. 256, 257.

[16] Estate of Wood (1868) 36 Cal. 75; Mitchell v. Donohue (1893) 100 Cal. 202, 207, 34 Pac. 614, 38 Am. St. Rep. 279.

[17] Kinnebrew's Distributees v. Kinnebrew's Administrators (1860) 35 Ala. 628; Daniel v. Hill (1875) 52 Ala. 430; Hester v. Young (1847) 2 Ga. 31; In re Longer's Estate (1899) 108 Ia. 34, 78 N. W. 834; Estate of Skerrett (1885) 67 Cal. 585, 8 Pac. 181.

[18] Supra, n. 4.

[19] F. Labori, p. 257; F. Laurent, p. 189.

[20] G. Baudry-Lacantinerie, "Precis de Droit Civil," Tome 3, p. 686.

[21] M. Bugnet, p. 229.

[22] G. Baudry-Lacantinerie, p. 686; Aubry et Rau, Tome 7, p. 102.

[23] F. Laurent, p. 72.

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hand of the testator it is valid; but invalid when he is incapable of knowing the value of the characters he traced.[24]

Interlineations are valid if written at the same time as the will, though not separately signed and dated.[25] If written after, such clause would not be dated, or would bear a false date, and that would annul the will under the French decisions. Planiol says that if later changes making new dispositions are specially dated and signed they will be valid as independent testaments.[26] So with an erasure—it depends on who did the erasing. If by a third person without the consent of the testator, it has no effect on the will. If still legible then the erased words are given effect; if not, it then results in a partial destruction of the instrument, and if a legatee is damaged he has an action against the one who did the erasing. However, if the erasing was done by the testator, such disposition is revoked or held not to exist. If it be an essential element of the olographic will, as the signature, that would destroy the will itself.[27] It should be noticed that in California the matter of revocation of olographic wills is governed by the same rules as control in the revocation of witnessed wills.

Both in France and in the United States the will may be written in pencil or with any other instrument and may be expressed in any language known to the writer.[28] In California, this liberality with respect to the material forms does not justify writing on the typewriter, even though done by the hand of the testator;[29] and if any part of the will is printed, the instrument is void.[30] If it is written on several sheets, it is not necessary either in France or in California that each be dated and signed, nor that they be fastened together by mechanical or other device. They must, however, depend on one another and form a single whole. It is not necessary that the testator mention that it has been written, dated and signed by him.[31]

The second requisite of the olographic will is that it be dated. The will is void in both France and California unless dated.[32] American cases hold that the word "date" means the

[24] M. Planiol, p. 661; Laurent, p. 175.
[25] F. Laurent, p. 193.
[26] M. Planiol, p. 664.
[27] F. Laurent, p. 195; M. Bugnet, p. 229, 230.
[28] Heirs of Philbrick v. Spangler (1860) 15 La. Ann. 46; M. Planiol, p. 663; F. Laurent, p. 173.
[29] In re Dreyfus' Estate (1917) 175 Cal. 417, 165 Pac. 941; 5 California Law Review, 503.
[30] In re Plumel (1907) 151 Cal. 77, 79, 90 Pac. 192, 121 Am. St. Rep. 100; Billing's Estate (1884) 64 Cal. 427, 1 Pac. 701.
[31] F. Laurent, p. 178; Estate of Merryfield (1914) 167 Cal. 729, 141 Pac. 259; G. Baudry-Lacantinerie, p. 689.
[32] The Code Civil, § 970; Cal. Civ. Code, § 1277; Estate of Rand (1882) 61 Cal. 468, 474, 44 Am. Rep. 555; Billing's Estate, supra, n. 30; In re Plumel, supra, n. 30.

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year, month and day.[33] A date which is incomplete because lacking a statement of the day, the month or the year of execution does not satisfy the statutory requirement of an olographic will.[34] "Date" refers only to time, however, and not to place or hour.[35] The date must be entirely in the handwriting of the testator. If it is printed in part the will is invalid.[36] However, assuming that the printing of part of the date vitiates the instrument as an olographic will, a codicil thereto written on the reverse side of the paper, entirely written, dated and signed by the hand of the testator remedies the defect in California upon the principle of republication.[37]

The place of the date is immaterial; it may be in the beginning or at the end, or even in the text of the will, provided, say the French commentators, that it is intended as a date.[38] It ought ordinarily to precede the signature, but may follow it or be on the same line. In both France and California, the date may be specified with reference to events; for example, Xmas, 1918, instead of December 25, 1918, would suffice.[39] In the former place, it may even be a reference to a private event, as the birthday of a certain person, when that is definitely known. Truth in the date is a requirement under French law, but the true date need not be expressed under the California decisions.[40] The writing of the will need not be completed in one day.[41] If parts are written on different days, each part may be signed and dated, but this is not necessary, the final signature and date suffice. Well-known abbreviations may be used; for example, 4-14-07; but "Winters, Yolo Co., 10, 1912" is insufficient.[42] While the will is void, if the date is incomplete, some commentators argue that it may be remedied if the error was involuntary and the contents show the true date. Laurent and the court of Cassation agree, however, that a false date is the

[33] Estate of Price, supra, n. 6; Estate of Anthony (1913) 21 Cal. App. 157, 131 Pac. 96; Heffner v. Heffner (1896) 48 La. Ann. 1088, 20 So. 281.

[34] F. Laurent, p. 201, 204; G. Baudry-Lacantinerie, p. 686, 687; Estate of Vance, supra, n. 12.

[35] Estate of Fay (1904) 145 Cal. 82, 78 Pac. 340, 104 Am. St. Rep. 17; Estate of Clisby (1904) 145 Cal. 407, 78 Pac. 964; M. Planiol, p. 663.

[36] Billing's Estate, supra, n. 30.

[37] Estate of Plumel, 5 Coff. Prob. Dec. 243.

[38] F. Laurent, p. 229-231; M. Planiol, p. 662.

[39] In re Vance, supra, n. 12; Estate of Fay, supra, n. 35; Estate of Clisby, supra, n. 35; M. Planiol, p. 662.

[40] M. Planiol, p. 662; Laurent, p. 200; G. Baudry-Lacantinerie, p. 687; Estate of Fay, supra, n. 35; Estate of Carpenter (1916) 172 Cal. 268, 156 Pac. 464; 5 California Law Review, 266.

[41] Stead v. Curtis (1911) 191 Fed. 529; Estate of Carpenter, supra, n. 40.

[42] F. Laurent, p. 228; In re Plumel, supra, n. 30; Estate of Lakemeyer (1901) 135 Cal. 28, 66 Pac. 961, 87 Am. St. Rep. 96; Estate of Carpenter, supra, n. 40.

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same as none and the date is false when the will is ante-dated or post-dated.[43]

The third and last requisite is that the will be signed by the testator. With respect to the signature it may be observed that according to the continental doctrines it must be at the end of the instrument, although it may be followed by the date. It cannot be in the body of the instrument.[44] In France, it has been held that the signature may be on the envelope of the will, if that envelope can be considered as part of the will, forming with it an inseparable whole.[45] A contrary decision was reached in California, in the case of In re Manchester.[46] Here, the signature need not be at the end and may be in the body of the instrument.[47] But where the signature is not at the end, it must appear from the face of the will that it was placed where it was for the purpose of execution.[48]

In France, the initials of the testator are not a sufficient signature, although the testator was in the habit of so signing; nor is a sign sufficient.[49] The family name (with or without the given name) constitutes the signature in the eyes of the law. There is, however, some authority to the contrary, holding that it is sufficient if the testator sign as he habitually would.[50] In this country, the first name has been held sufficient, when it was shown that the testator habitually signed his first name alone and intended a complete execution of the instrument.[51] This, it seems, would be a dangerous principle to establish universally. The rule in California seems to be that wherever placed, the fact that it was intended as an executing signature must satisfactorily appear on the face of the document itself. If at the end of the document, the universal custom of mankind forces the conclusion that it was appended as an execution, if nothing to the contrary appears. If placed elsewhere, it is for the court to say, from an inspection of the whole document, its language as well as its form, and the relative position of its parts, whether or not there is a positive and satisfactory inference from the document itself that the signature was so placed with the intent that it should there serve as a token of execution. If such inference thus appears, the execution may

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[43] F. Laurent, p. 217.
[44] Yale Law Journal, Nov. 1918, p. 77, 34.
[45] F. Laurent, 229-230; F. Labori, p. 257.
[46] In re Manchester (1917) 174 Cal. 417, 163 Pac. 358, Ann. Cas. 1918 B, 227; 5 California Law Review, 354.
[47] In re Stratton (1896) 112 Cal. 513, 44 Pac. 1028; In re Camp's Estate (1901) 134 Cal. 233, 65 Pac. 134.
[48] In re McMahon (1917) 174 Cal. 423, 163 Pac. 669; 5 California Law Review, 354.
[49] The Code Civil, § 970; F. Laurent, p. 243.
[50] M. Planiol, p. 662; F. Laurent, p. 246.
[51] Appeal of Knox (1890) 131 Pa. 220, 18 Atl. 1021.

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be considered as proved by such signature.[52] Where the name appears only in the initial clause of an olographic will, it is not signed within the meaning of the statute.[53]

The fact that words non-essential to the will follow the signature does not affect the validity of the will.[54] The omission of one or more letters from the signature does not vitiate it, provided it is certain that the name is that of the testator. The will is valid even though the piece of paper on which it is written is torn in part, or part of the signature has disappeared by accident, if what remains shows it to be that of the testator.[55] But if the signature is intentionally removed by the testator, one of the essentials of the olographic will is removed. Laurent and Pothier think the signature should close all, and all that precedes it constitutes the act. Following this theory, a postscript is without date, unless in some way indicated as attached to the body of the will. They prefer the strict rule approved by the Court of Cassation of France that every testamentary disposition ought to be dated, especially where it is independent of the will.[56]

M. H. V. G.

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[52] Estate of Manchester, supra, n. 46; 5 California Law Review, 354.
[53] Estate of Manchester, supra, n. 46; Estate of Hurley (1918) 56 Cal. Dec. 190.
[54] F. Laurent, p. 242.
[55] F. Laurent, p. 246.
[56] F. Laurent, p. 234-339, 249; M. Bugnet, Tome 1, p. 403.

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Book Reviews

CRIMINOLOGY. By Maurice Parmelee. The Macmillan Company, New York, 1918. pp. xiii, 522. $2.00.

In reviewing a book fairly, the author's purpose in writing his book should be strictly considered. In Parmelee's "Criminology", the purpose is to place in the hands of beginners in the science of criminology, a concise, modern treatment of the subject, and to furnish a rather complete working bibliography to which the student may refer for further special reading.

Until this book appeared nothing satisfactory existed which could be placed in the hands of college students as a textbook in criminology adequately covering the whole field. This book meets a want keenly felt by those conducting courses in criminology, but not all students of crime will agree with some of the theories and conclusions of the author, and many will experience some dissatisfaction with the meagre treatment of some important topics. In the main, the treatment of the subject material is sound and the ground covered adequate for the purposes of a textbook.

Those particularly interested in juvenile delinquency will be somewhat disappointed that this field is not more thoroughly covered, and will regret to discover that some very important factors such as mental complexes, feeble-mindedness, and dementia praecox are very lightly touched upon. Others will be similarly disappointed not to find a fuller treatment of practical police methods, and particularly the *modus operandi* of criminals, which forms the basis of scientific police study today. The book does, however, fill an urgent demand on the part of college students, social workers (including clergymen) probate officers, and progressive police officials who are for the first time taking up the serious study of the new science of criminology.

The reviewer finds it unnecessary to indulge in possible concrete criticisms of this treatise, because, on the whole, it offers a splendid introduction to the study of crime and juvenile delinquency. In the reviewer's opinion, the author is to be congratulated on the timely appearance of his book.

E. B. H.

Books Received

TREATISE ON FEDERAL TAXES, A. By Henry Campbell Black. Vernon Law Book Co., Kansas City, Mo. 4th ed. 1919. pp. xxxi, 704. Buckram. $6.00.

HANDBOOK ON THE LAW OF EVIDENCE. By C. F. Chamberlayne, edited by Arthur W. Blakemore and DeWitt C. Moore. Matthew Bender & Co., Albany, New York. 1919. pp. xxxiv, 1024. Leather. $12.00.

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California Law Review

VOL. VII MAY, 1919 Number 4

Proceedings for the Issuance of City Bonds In California

JOHN YOUNGHUSBAND, the Pickle Manufacturing Corporation, and the City of Harmony, respectively desire to buy a lot and erect thereon a building. The cost in each case exceeds not only the ready funds of the purchaser but is so great that a term of years will reasonably be required to pay it. It is desirable that title be acquired promptly. How can the purchaser raise the money? Despite the admonitions of Polonius, all three turn instinctively to borrowing. The natural person, being of legal age and sound mind, is confronted by only one substantial obstacle. He must find a complacent creditor, and thereafter the legal formalities rarely require the services of counsel. He has the legal power (1) to acquire the lot and build the house; (2) to borrow money for that purpose; (3) to issue his negotiable promise to pay as evidence of the debt. In America, at least, the private corporation is scarcely aware of the possibility that there was ever a doubt of its legal capacity to acquire the improvements and contract the debt. Should the desired method of evidencing the latter take the form of whatever the constitution of California means by "bonds" and "bonded indebtedness",[1] the corporation is bound only to follow the form provided in a single code section[2] which has presented difficulties to the higher courts only upon most infrequent occasions.

The happy lot of our first two friends may well be envied by the city. Generally speaking, it has no implied power to acquire the improvement. Even if it has express power to acquire the improvement, it has no implied power to borrow the money. Even though it has an express authority to borrow the money, it has no implied power to issue negotiable securities or "bonds" therefor. Even where it has authority to issue bonds,

[1] Art. XII, sec. 11.
[2] Cal. Civ. Code § 359.

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the authority falls within the rule that "the mode is the measure of the power."

These four principles form the background for any detailed study of the statutes and decisions affecting the issuance of city bonds. The first belongs to the general subject of municipal powers; the balance to our particular subject.

The contemporary financier asks the question: "Assuming the city to be endowed by the sovereign with personality, with the express power to get the improvement, why is not the power to borrow inherent or implied, and why if borrowing is permitted cannot it take the form which common experience finds most convenient in ordinary business life?" Judge Dillon gives him the strongest reasons why not.[3] If the inquirer is a practical person he had best be convinced by the Judge's reasoning because it is most assuredly the law. It is true that when he reads the language that "there is no resemblance between private and public or municipal corporations in this regard. The latter are simply agencies of government. They are not organized for trading, commercial or business purposes",[4] then turns to the charter of the City of Los Angeles and finds that city empowered among other things to engage in the enterprises of transportation, telephone, "terminal facilities, water, light, heat, power, refrigeration, storage, or any other public service",[5] and to "acquire, own, hold, sell, deal in, manage, operate or control any office, department, business, utility or property, which might or could be acquired, owned, held, sold, dealt in, managed, operated or controlled by any person, firm, or corporation whatever",[6] he may feel his perception of the classic argument against the municipal power not crystal clear. If, however, he looks into the story of how cities formerly exercised less restricted borrowing powers in flush times, and what befell the taxpayers as well as creditors thereof in long continued dull times, and concludes that the thought in the minds of judges and constitution makers alike has really been that cities still partake of the characteristics of John Younghusband before he became of age and

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[3] No implied power to borrow. Dillon, Municipal Corporations (5th ed.) § 278 *et seq.*
No implied power to issue negotiable bonds. Dillon Municipal Corporations (5th ed.) § 872, *et seq.*

[4] § 872.

[5] Charter of Los Angeles, Art. I, § 2 (7).

[6] Charter of Los Angeles, Art. I, § 2 (50).

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married, he comes out nevertheless with a strong hesitation to criticise the rules stated by Judge Dillon.

Constitutional Provisions.

The constitution of 1849 confined itself to recognizing the dangers involved in municipal borrowing and bidding the legislature look to the subject.[7]

The constitution of 1879 laid down express limitations on the power. Aside from an immaterial change in phraseology, the extension in 1892 of the maximum term from twenty to forty years, and the addition of exceptions to the rules applicable to certain specified bond issues, the main section stands as originally adopted. The important section is Article XI, Section 18. It imposes limitations upon certain public corporations only, viz., counties, cities and towns, and school districts.[8]

It does not purport to restrict all bonded indebtedness of cities, but only bonded indebtedness of a size "exceeding in any year the income and revenue provided for such year."[9]

It does not limit the funding of pre-existing indebtedness.[10]

Its limitations are three:

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[7] Art. IV, § 37.

[8] County irrigation districts, for example, are not covered by this section. Bliss v. Hamilton (1915) 171 Cal. 123, 132, 152 Pac. 303, 307; nor are ordinary irrigation districts, In Re Madera Irrigation District (1891) 92 Cal. 296, 342, 27 Pac. 666, 25 Am. St. Rep. 186; nor is a flood control district organized by special act. Los Angeles County Flood Control District v. Hamilton (Dec. 31, 1917) 55 Cal. Dec. 115, 169 Pac. 1028. The law regulating the issuance of bonds of such districts frequently imposes limitations similar to those of the constitution. In such cases the legislature may by validating act waive the requirements it has imposed. Los Angeles County Flood Control District v. Hamilton, supra. This it could not do if the constitutional provisions were applicable.

[9] For present practical purposes the constitutional limitations do affect all city bond issues because the only issues permitted by the legislature under the Municipal Bond Act of 1901 are those where the estimated cost of the proposed improvement is too great to be paid out of the ordinary annual income and revenue of the city.

[10] Because it is held that no new indebtedness is created thereby within the meaning of the constitution. City of Los Angeles v. Teed (1896) 112 Cal. 319, 326, 44 Pac. 580, 582. Although the court states that the record does not show when the original indebtedness was incurred the opinion discusses the possibility of a constitution or statute prohibiting or making impracticable the funding of debts by new issues of bonds and doubts the existence of the power; "in a majority of cases, the only way in which municipalities can pay their debts is by issuing funded bonds."

The recent case of City of Long Beach v. Lisenby (In Bank, Feb. 26, 1919) 57 Cal. Dec. 247, throws great additional light on this constitutional provision. By virtue of Cal. Stats. 1897, p. 75, the legislative body can, by its two-thirds vote, issue bonds to fund judgments against

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(1) The issuance of bonds must receive the assent of two-thirds of the qualified electors of the city voting at an election to be held for that purpose.

This language seems to be construed with strictness but not with severity. The total of electors of which two-thirds must assent is not the number registered, but the number voting at the election. Of registered electors casting ballots, it has been said that those whose ballots are properly rejected do not count in making up the total.[11]

If two or more bond propositions are submitted at the same election, it is not enough that a proposition receives the affirmative two-thirds vote of those who vote either for or against that proposition, but it must receive the two-thirds vote of all voting at the election. Thus, on Proposition I the vote stands Yes 200, No 50, and on Proposition II, Yes 150, No 300. Both fail to carry, for 450 is the number of voters voting at the election and 300 affirmative votes are required.[12]

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the city aggregating more than $370,000 arising out of actions for death and personal injuries due to negligence. "This of course, they could not do as to such of the contractual obligations as would come within the inhibition of § 18."

[11] State v. Clausen (1913) 72 Wash. 409, 130 Pac. 479. See City of Inglewood v. Kew (1913) 21 Cal. App. 611, 132 Pac. 780. See also People v. Sausalito (1895) 106 Cal. 500, 39 Pac. 907. The theory seems to be that ballots which are properly rejected are "mere blanks, not to be counted for any purpose". Many may, however, view with sympathy the dissent of the Chief Justice in the Washington case. The opinion on this point in the Inglewood case seems to be *dictum* inasmuch as the bonds were held invalid on other grounds. In the Sausalito and other like cases no constitutional provision was involved and a more easy going canon of construction may be permissible. Some at least of the ballots which the court in the Inglewood case held to have been properly rejected would seem to have been good under the rule laid down in Turner v. Wilson (1915) 171 Cal. 600, 154 Pac. 2. The main question seems still an open one in California with the likelihood that ballots properly rejected will be held not to count even in making the total. For obvious reasons, however, no careful attorney will feel safe in approving a bond issue where the canvassed affirmative votes do not equal two-thirds of the number of persons purporting to cast ballots as shown by the poll lists.

[12] Law v. San Francisco (1904) 144 Cal. 384, 394, 77 Pac. 1014, 1018; (Judge Henshaw's words to the effect that the decision is based upon the terms of the charter are evidently unmindful of the existence of the constitutional limitation); Long Beach v. Boynton (1911) 17 Cal. App. 290, 119 Pac. 677. Cf. also, Santa Rosa v. Bower (1904) 142 Cal. 299, 75 Pac. 829; People v. Town of Berkeley (1894) 102 Cal. 298, 36 Pac. 591. Beware of reliance on City of Hanford v. Williams, (1914) 23 Cal. App. 668, 139 Pac. 224. The court refused to pass on the validity of seven disputed ballots (four of which were for the bonds and three against), because the affirmative votes were two-thirds of the total undisputed ballots. The court forgot, however, to count these seven as part of the total. If one adds the total of seven disputed

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A puzzling question is presented by the clause "voting at an election to be held for that purpose." This may mean either of two things. First, that not all the qualified electors count in estimating the total, but only such as vote at the election. If this is correct the words "to be held for that purpose" are surplusage. Second, that in order to afford the fullest consideration for this early form of referendum, the question of bonded indebtedness must be submitted at an election where neither offices nor other questions are to be voted upon. Earlier legislation seems to have inclined to the latter interpretation and up to 1915 the municipal bond act forbade the submission of other questions. An amendment now permits it,[13] and the decision in Howland v. Board of Supervisors seems to support it[14] though the matter cannot conservatively be said to be beyond argument.[15]

(2) The second limitation is that before, or concurrently with, the incurring of the indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest as it falls due, and also provision to constitute a sinking fund for the payment of principal on or before maturity. As substantially all city bonds are payable in equal annual installments, no special reference need be made to the sinking fund provision, as each year's tax cares not only for interest, but also for an aliquot part of the bonds. This clause can hardly prove a pitfall in any case because it has been held that the "provision" can be made by legislative enactment and the general municipal bond act provides that the legislative body of the city must levy the

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ballots to the total of undisputed ballots, it appears that the bonds lost by one vote.

[13] Section 12¾ added to the Municipal Bond Act of 1901 by Cal. Stats. 1915, p. 98 and p. 1454.

[14] (1895) 109 Cal. 152, 41 Pac. 864. Here the bond proposition was voted upon on the same day and at the same places as the offices and propositions of the general election. The decision goes upon the theory that these were in substance two elections, the general election and the special one, that only the voters who voted yes or no on the bond proposition are to be deemed as voting at the special election. In Law v. San Francisco, supra n. 12, however, Judge Henshaw in discussing the Howland case with approval states that only one ballot was used. Cf. also Belknap v. Louisville (1896) 99 Ky. 474, 36 S. W. 1118, overruled on other grounds in Montgomery County v. Trimble (1898) 104 Ky. 629, 47 S. W. 773.

[15] Cf. the argument in the dissenting opinion in Belknap v. Louisville, supra, n. 14, and in San Diego v. Potter, infra, n. 26, on the subject of the submission of an illegal bond proposition along with good ones.

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required taxes, which is sufficient compliance with the constitution.[16]

(3) The third limitation is that the final maturity of the indebtedness shall not exceed forty years from the time of contracting the same. By some miracle no city seems to have given occasion for this clause to receive judicial construction. "The time of contracting the indebtedness", as used in this and the preceding limitation, as well as in the statutes, refers not to any of the preliminary steps in the proceedings, nor to the date of the bonds, but to the time when they are delivered to the purchaser.[17] The bonds should of course bear a date prior to the date of delivery and should mature not more than forty years from the date they bear; so that in practice they should fall a little inside the constitutional requirement.

Any bonds issued contrary to the constitutional limitation are declared to be void.

The next constitutional provisions substantially to affect our municipal bond law were sections 13 and 16 of Article XI, respectively, the former providing against the delegation to any special commission or private person of the power to control or in any way interfere with any county, city, or municipal improvement, money, or property, or perform any municipal function, and the latter requiring all county or city moneys coming into the hands of any officer thereof to be immediately deposited with the treasurer. Two of the principal desiderata of investors in the late '80's and early '90's seem to have been a provision that payments of bonds should be made in gold coin rather than lawful money, and in some eastern financial center rather than

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[16] Howland v. Board of Supervisors, supra, n. 14. A gap owing to the fact that the first annual tax levy will not produce funds in time to take care of the first maturities is not obnoxious to the constitution. Jenkins v. Williams (1910) 14 Cal. App. 89, 111 Pac. 116. Where the legislative body had taken the preliminary steps to issue bonds but the bonds were unsold at the time of making the annual tax levy it was formerly customary to levy the bond tax anyway in order to care for payments when the bonds should be sold. This practice is forbidden by the case of Connelly v. San Francisco (1912) 164 Cal. 101, 127 Pac. 834. The same point was raised in Skinner v. Santa Rosa (1895) 107 Cal. 464, 127 Pac. 834, but not discussed. The purchaser, therefore, must always take care as to what practical provision exists for paying his first maturing bonds and coupons.

[17] Clark v. Los Angeles (1911) 160 Cal. 30, 116 Pac. 722. Moreing v. Shields (1915) 28 Cal. App. 513, 516, 152 Pac. 964, 965; O'Neill v. Yellowstone Irrigation District (1912) 44 Mont. 492, 121 Pac. 283.

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at the city treasury.[18] The legislature in 1893 sought to permit this result to be accomplished and let bonds be made payable either in gold coin or lawful money and at New York, Chicago, Boston or San Francisco.[19] Pursuant to this statute the city of Los Angeles attempted to make certain bonds and the interest thereon payable at the Chemical Bank in New York. The court, in the case of City of Los Angeles v. Teed, supra, held this position of that statute to be unconstitutional, arguing that the result of eastern payment could be accomplished in only two ways; either the city treasurer must carry the funds there twice a year, or he must remit to the fiscal agent bank and authorize it to pay. There was no authority for the treasurer to travel outside California, and it was doubtful if it could be given. The alternative of having the bank act as fiscal agent for the city was clearly forbidden by the constitutional sections.

In course of time the practical expediency of having bonds payable in eastern cities became so apparent that in 1906 a new section (No. 13½) was adopted providing in substance that nothing in the constitution should be construed as preventing a public corporation from making its bonds payable anywhere in the United States. As a practical matter the adoption of this section did not have the results expected. Cities were no longer prohibited from having outside fiscal agents, but they still (with the exception of a few far-sighted chartered cities which happened to be amending their charters) had no affirmative power to use the foreign instrumentalities. Even on the assumption that an amendment to the municipal bond act authorizing the issuing body to fix the place or places of payment supplied the lack in most cities, there were a large number of chartered cities, with charter provisions inserted during a period of eighteen years to avoid the snares of the Teed case, who had no such powers. Accordingly, in 1914, section 13½ was amended to give all public corporations issuing bonds under the laws of California, authority and power, first, to make the principal and interest payable anywhere; second, to make the principal and interest payable in any money, domestic or foreign. This amendment fills all gaps insofar as affirmative power is concerned.[20]

[18] See Skinner v. Santa Rosa, supra, n. 16, for an example of the practical effect the change in coinage and place of payment made in obtaining bids.

[19] Cal. Stats. 1893, p. 59.

[20] Interesting questions remain undecided. Section 18 of the same

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Obsolete General Bond Acts.

Subsequent to the adoption of the constitution of 1879, the legislature passed several general acts relating to municipal bonds. These are of more than historic importance for several reasons. They are substantially similar in frame work to the present Municipal Bond Act of 1901, and as they have been the source of important litigation these decisions throw light on mooted points in connection with the current act.

The Act of 1887[21] laid down a scheme for cities incurring bonded indebtedness for permanent municipal improvements. The legislative body by ordinance passed by three-fourths of its members, and approved by its executive, was to determine the public necessity of the improvement. At the next regular or adjourned meeting after the publication of the ordinance was complete, by similar vote and approval, it could adopt an ordinance calling the bond election, at which none but bond questions could be submitted. The ordinance was required to state divers essentials regarding the issue: (1) its objects and purposes, (2) the estimated cost of the improvement, (3) the necessity for the improvement, (4) a statement that the bonds would be issued if voted, and (5) the date and manner of holding of the election. In addition to the publication of the ordinance and following such publication, there had to be pub-

article still provides for the assent of two-thirds of the qualified voters to the bond issue. The voters now vote on the basis of the terms of an ordinance calling the election. Suppose the ordinance calling the election provides that the bonds shall be issued in form providing that they shall be payable at the city treasury only and in any kind of lawful money existing at the date of maturity. Would the city's legislative body after an assent so given have authority to issue bonds payable either at the office of the city treasurer or at the National City Bank in New York, at the option of the holder, in gold coin of the present standard of weight and fineness? It is submitted that the answer is no. It is possible that the new section is annunciatory of a state policy to the effect that the legislative issuing body is to have unhampered discretion in these details. The grant of power, however, is to the public corporation, not merely to its legislative body, and under section 18, the assent of two-thirds of the voters is a *sine qua non*. Section 13½, therefore, gives the authority to the issuing body only by and with the assent of the required per cent of electors. On the other hand, it is at least doubtful whether by charter or legislative act the city can be restricted from issuing bonds in the manner provided in section 13½. The answer will turn upon whether the section is permissive only, or whether in the light of its history and language it be construed as the sovereign's announcement that public corporations are to have at the time of voting for and issuing bonds the untrammeled right to make them payable where and how they please.

[21] Cal. Stats. 1887, p. 120.

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lished for two weeks a notice of election, stating (1) notice of election, (2) purpose of bonds, (3) amount of indebtedness, (4) number and character of bonds, (5) rate of interest, and (6) amount of tax levy. If the bonds obtained the requisite two-thirds vote, the legislative body could issue them as serials for a term of twenty years (which was then the constitutional limitation), one-twentieth payable each year in denominations of $100 to $1000 at not more than 5% interest[22] with broad discretionary powers as to sale at not less than par. In order to comply with the constitutional provisions, the legislative body was ordered to levy the necessary annual tax.[23]

The Act of 1889[24] provided that the legislative body must have in the first instance plans and estimates of the proposed improvement. The ordinance determining the public interest and necessity was substantially the same as in the Act of 1887 except here as in the ordinance calling the election, the three-fourths vote was reduced to two-thirds. In sixth class cities with a legislative body consisting of five trustees the change seems immaterial. Four was necessary in either case. The notice of the election was slightly simplified by omission of the amount of indebtedness. Amount of all indebtedness was limited to five per cent of the assessed valuation of property, a valuable rule to prevent cities impairing their credit. Interest was limited to seven per cent. Bonds could be made payable at the city treasury, or at any bank in San Francisco, Chicago, New York or Boston. Definite provisions for formalities of execution were inserted. The usual order

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[22] Raised to seven per cent by Cal. Stats. 1889, p. 14.

[23] Section 10 contained a broad repealing clause. It is not certain just what acts were covered by it. The municipal corporation bill made special provision for issues by cities of various classes, (e. g. second class, § 329; third class, § 528; fifth class, § 768; sixth class, § 866). The two latter were expressly repealed in 1913. No preliminary resolution or ordinance of public necessity was required. The procedure was quite simple. In Redlands v. Brook, (1907) 151 Cal. 474, 91 Pac. 150, the question whether these sections were still in force was left undecided. They seem seldom, if ever, to have been used in practice since 1901, possibly because of the twenty year limitation on the bonds.

Political Code sections 4445 *et seq.* relating to refunding seem to be still in effect and are not limited to cities organized under the Political Code, See Los Angeles v. Teed, supra, n. 10. Inasmuch, however, as bonds issued since 1879 have had to have provision at the time of issue for the means of payment, refunding of bonded indebtedness is practically obsolete.

The recent case of Long Beach v. Lisenby, supra, n. 10, illustrates, however, a current case of bond funding to care for an extraordinary tort liability reduced to judgment.

[24] Cal. Stats. 1889, p. 399.

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for the levy of annual taxes was made. In 1893[25] the act was amended to provide that the bonds could be made payable in gold coin or lawful money and that the interest could be made payable annually or semi-annually.

The Municipal Bond Act of 1901.

Molded on these predecessors, the act of 1901, though amended in divers particulars, has, for eighteen years, set forth the usual method of issuing the great bulk of California city bonds.[26]

Sections 1 to 7 include the successive steps for issuing bonds. The first section states that any city "may as hereinafter provided incur indebtedness to pay the cost of any municipal improvement requiring an expenditure greater than the amount allowed for such improvement by the annual tax levy." The second section provides that when the legislative branch shall by a certain resolution determine that public interest or necessity demands the acquisition, construction, or completion of any municipal improvement, the cost of which will be too great to be paid out of the ordinary annual income and revenue of the municipality, it may at any subsequent meeting order the submission of the bond question at an election. The phrase "municipal improvement" is defined in section 2 as including bridges, waterworks, sewers, light and power works, wharves, schoolhouses, street work, and divers others specifically enumerated, as well as those included in the catch-all, "or other works, property or structures, necessary or convenient to carry out the objects, purposes and powers of the municipality."[27]

This apparently broad scope of authority may well mislead the unwary. The act says that any city can incur indebtedness for street work, and issue bonds representing the indebtedness.

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[25] Cal. Stats. 1893, p. 61.

[26] Cal. Stats. 1901, p. 27, (Deering, Gen. Laws, Act 2371). The Act, however, is not to be construed as the exclusive mode. For example, bonds may also be issued for parks under a separate act, Oakland v. Thompson (1907) 151 Cal. 572, 93 Pac. 283; San Diego v. Potter (1908) 153 Cal. 288, 95 Pac. 146, and for assembly or convention halls under Cal. Stats. 1903, p. 412. Proceedings for bonds which may be taken under more than one statute may prove puzzling unless they show clearly under what authority they are taken or unless the draftsman molds them to meet the requirements of both statutes. The latter course is generally both feasible and safer.

[27] The cases given in section 2 are not so much illustrative as intended to solve specific doubts, and not to be interpreted by the rule *noscitur a sociis* nor by *inclusio unius exclusio alterius*. Oakland v. Thompson, supra, n. 26.

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We have seen above, however, that the city must show authority to do three things, (1) get the improvement, (2) incur an indebtedness for it, and (3) issue bonds therefor. Does the act supply this triple power? On the surface, yes,—in substance, no. The city must have been granted *aliunde* the power to acquire the improvement. Only if such power has been granted does this act give authority to incur an indebtedness and issue bonds therefor.[28]

It is therefore of fundamental importance before commencing proceedings to seek elsewhere either in the municipal corporation law, in the charter, or in some other general law for the authority to acquire the particular improvement desired.

The bond issuing authority is furthermore limited to acquisition, construction and completion of improvements. Bonded indebtedness cannot be incurred for the repair of an existing improvement,[29] though the line between completion of a bridge half washed away, and the plain repair of half a bridge, will sometimes be dim to the eye of the casual layman; ritualistic adherence to the statutory language may, however, permit the city to attain its desire and still avert an adverse decision. The act means that cities may cast the burden of getting improvements upon the future, but what they have gotten they must maintain out of current funds.

Next note that bonded indebtedness cannot be incurred for all improvements. The cost must exceed by section 1 "the amount allowed for such improvement by the annual tax levy". This modest limitation is made more stringent by the requirement in section 2 that the estimated cost must be "too great to be paid out of the ordinary annual income and revenue of the municipality."[30]

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[28] Redondo Beach v. Cate (1902) 136 Cal. 146, 68 Pac. 586, (interpreting the act of 1889 but with an argument equally applicable to this act and so considered in San Diego v. Potter, supra, n. 26); Long Beach v. Lisenby (1917) 175 Cal. 575, 166 Pac. 333.

[29] See concurring opinion in Long Beach v. Boynton, supra, n. 12. But cf. Johnson v. Williams (1908) 153 Cal. 368, 95 Pac. 655, (County bonds).

[30] The reason for the second limitation is somewhat obscure. It suggests the constitutional phrase "indebtedness . . . . exceeding in any year the income and revenue provided for such year". In the constitution no limits are placed on indebtedness of an amount less than this. In the bond act no bonded debt can be incurred unless of an amount such as to exceed this. Probably the legislature intended to prevent the use of the borrowing power in cases of minor and inexpensive improvements. The procedure would be much simpler, however, if the minimum

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Can bonded indebtedness be incurred under the act for anything except a municipal improvement? The answer is "no". What then is a municipal improvement? The clause is broad enough to cover a lot with a municipal building thereon and a fire engine and hose. Although "improvement" is no longer modified by "permanent" as it was in the Act of 1887, it seems clear that only items of a comparatively nonconsumable nature are included. Probably fire apparatus marks the outside limit. How improved or to what degree finished must the improvement be? Very raw land would do for a scenic park, but it is highly questionable whether a vacant lot intended at a later indefinite date for use as a building site would be covered. It is submitted that the criterion is whether the object sought to be acquired will, when the bond moneys have been expended therefor or thereon, in its then form constitute a permanent finished product adapted for municipal use.[31]

In examining the procedural requirements stated in the act one must bear in mind their substantive potency because of the rule that "the mode is the measure of the power." It should also be noted that the act purports to set forth a single, separate and entire scheme for incurring bonded indebtedness.[32]

(1) The Resolution of Public Necessity.

The first procedural step is the adoption by the legislative body of the city of a resolution determining that public interest or necessity requires the acquisition, construction or completion

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restrictions were omitted altogether, and the matter might safely be left to the discretion of the legislative body and the electors.

[31] No highly detailed plan for the improvement is required. Clark v. Los Angeles (1911) 160 Cal. 30, 42, 116 Pac. 722, 726. In Santa Barbara v. Davis (1904) 142 Cal. 669, 76 Pac. 495, it was held that a chartered city with power to acquire land for city purposes could out of general funds purchase land intended to be improved later, even though no provision was yet made for improving it. The unexpressed or secret intent and motive of the legislative body regarding the improvement is immaterial. Clark v. Los Angeles, supra. A reasonably definite picture is all the elector can require.

[32] Thus formalities for the adoption of ordinances generally do not apply to the ordinance calling the election which is specifically described in the bond act. Derby v. Modesto (1894) 104 Cal. 515, 38 Pac. 900, (construing the act of 1889 but with reasoning still pertinent); and the details as to printing of ordinance set forth in Political Code section 4459, do not apply to said ordinance. Clark v. Los Angeles, supra, n. 31. But if a city charter lays down other or different requirements than the bond act they must not be departed from, for the issuance of bonds seems generally to be a municipal affair. Fritz v. San Francisco, (1901) 132 Cal. 373, 64 Pac. 566. See also Law v. San Francisco, supra, n. 12.

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of the improvement.[83] This requirement of an initial resolution, which generally makes no reference to bonds, is solely statutory. It is not found in all of the earlier legislation and is probably due solely to abundant caution on the part of the legislature, which has thus required at least a brief period of reflection between the beginning of proceedings and the decision to submit the proposition to the electors. The resolution must originate with the legislative body. It must determine that the public interest or necessity requires the acquisition, construction or completion of the object. It should describe the improvement in sufficient detail to form a reasonably accurate picture in the mind of the voter; but prolixity should be avoided both on account of the fact that the purpose stated in the resolution must be used throughout the proceedings and because the longer the description the greater the likelihood of a fatal variance. The matter proves also of practical importance in assuming responsibility for the use of the bond moneys which must be applied only to the stated purposes.[84]

The purpose stated must be "a single purpose". This principle has caused considerable confusion and difficulty. The theory is that the voters must be given the right to say "Yes" or "No" to a specific proposition and not to a hodge-podge of elements appealing in divers forms to divers minds. Thus a proposition for acquiring bridges, highways, a poor-house and a hospital is not a single purpose.[85] On the other hand, the voter cannot demand that the proposition be submitted in as specific form as he might like. Thus two wagon roads if there is some reasonable ground for treating them as an entirety may be described as a single purpose.[86] A series of isolated parks can be treated as an integral park system and submitted as one proposition.[87] The same is true of a number of separate wharves, all forming parcels of the improvement of the water front.[88]

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[83] "Acquisition" is broad enough to cover either purchase or construction and pretty surely completion. Hartigan v. Los Angeles (1915) 170 Cal. 313, 320, 149 Pac. 590. It is generally safe practice to use the phrase "acquisition, construction, and completion."

[84] Jenkins v. Williams (1910) 14 Cal. App. 89, 116 Pac. 116.

[85] People v. Baker (1890) 83 Cal. 149, 23 Pac. 364, 1112.

[86] People v. Counts (1891) 89 Cal. 15, 26 Pac. 612.

[87] Oakland v. Thompson supra, n. 26.

[88] Clark v. Manhattan Beach (1917) 175 Cal. 637, 166 Pac. 806. The following cases should also be examined in connection with drawing this practically difficult line; Hartigan v. Los Angeles supra; Cary v. Blodgett (1909) 10 Cal. App. 463, 102 Pac. 668; Clark v. Los Angeles

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The resolution must find that the estimated cost of the improvement is too great to be paid out of the ordinary annual income and revenue of the city. This finding must be explicit.[39]

The finding as to cost involves the making of an estimate of the cost. The later provisions of the act make it reasonably clear that (unlike the situation under at least one of the earlier acts) no great precision is required as in the case of certain other forms of improvement proceedings. An honest though rough-and-ready estimate is enough, or, in formalistic verbiage, where the resolution determines the estimated cost at a certain number of dollars and that such cost is and will be too great to be paid out of the ordinary annual income and revenue, the prior making of a sufficient estimate is presumed.[40] The resolution should always, however, find the estimated cost in dollars and then make the other findings with reference to its exceeding the specified income and revenue. Apparently the estimated cost may exceed the amount of the bond issue.[41] It is highly doubtful if the converse is true.

The resolution must be adopted by two-thirds vote of all the legislative body.[42]

Many old-fashioned practitioners, probably on account of the fact that an ordinance was originally required, follow the prac-

(1911) 160 Cal. 317, 116 Pac. 966; Clark v. Los Angeles (1911) 160 Cal. 30, 116 Pac. 722.

[39] The statutory requirement has been held to be substantially different from (though smaller than) a charter requirement that bonds can only be issued in the event that the contemplated cost, in addition to the other expenditures of the city, will exceed the income and revenue provided for in any one year. Long Beach v. Boynton, supra, n. 12. Though the courts for brevity sometimes use "income" and "revenue" interchangeably they are not synonymous. "Revenue" refers to public funds obtained from the taxing and licensing powers, while "income" includes items collected from other sources. See 1 Dillon, Mun. Corp. (5th ed.) § 210, p. 415; Lamar etc. Company v. Lamar (1894) 26 S. W. 1025, 31 S. W. 756.

[40] Clark v. Los Angeles (1911) 160 Cal. 30, 43, 116 Pac. 722; Inglewood v. Kew, supra, n. 11.

[41] Oxnard v. Bellah (1913) 21 Cal. App. 33, 130 Pac. 701.

[42] The requirement of approval by the executive of the resolution and of the ordinance calling the election was fortunately made obsolete by Cal. Stats. 1913, p. 12, adopted in order not to interfere with the cities operating under the commission plan where it was doubtful who was the "executive". Prior thereto in sixth class cities the president of the board of trustees was the "executive", Redondo v. Barkley (1907) 151 Cal. 176, 90 Pac. 452. Until an amendment of § 875 of the Municipal Corporation Bill (Cal Stats. 1913, p. 15) which enlarged the powers of the president *pro tem.*, sixth class cities were, in the absence or during the disability of the president, greatly hampered in respect of approval of resolutions and ordinances. Cf. Dillon, Mun. Corp. (5th ed.) § 578, note.

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tice of publishing this resolution, but this is not required under the act of 1901.

(2) Ordinance Calling the Election.

The second step is the adoption by two-thirds of the legislative body of the ordinance calling the bond election and submitting the proposition to the electors.[43] It may be adopted at any meeting subsequent to the passage of the resolution of determination.[44] This ordinance not only calls the election, but when properly published constitutes the notice thereof. It must therefore contain all of the matters provided to be included by the act. These are set forth in the act in honest English and need no special elucidation.[45]

It is wise practice not to insert a mass of detail in addition to the matters required by the act, such as the denominations, dates of maturity, places of payment, or method of sale. When it comes time to issue the bonds the legislative body is intended to have, and should have, a free hand in such matters. If it inserts these provisions in the ordinance it is bound to follow them in all material matters as the assent of the electors was given on the conditions stated and not otherwise.[46] It is, however, wise in the present condition of the authorities, to state specifically in this ordinance whether the bonds and coupons are to

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[43] The proper form is to submit the proposition of incurring the specified bonded indebtedness to the qualified electors of the city. A submission to "the people" is, however, a substantial though inartistic compliance. People v. Counts, supra, n. 36.

[44] Redondo v. Barkley, supra, n. 42 holding that it is immaterial whether the subsequent meeting is an adjourned meeting of the original meeting or the next regular stated meeting.

[45] Among other required matters the ordinance must set forth the manner of holding the election and the voting for or against the bonds, and in all particulars not recited in the ordinance the general laws governing municipal elections control. Such provisions of the ordinance have, therefore, the full force of statutes. Inglewood v. Kew, supra, n. 11. So also where the ordinance required that the voters write "Yes" or "No" after the proposition on the ballot, the votes of the great majority who stamped a cross after the printed words "Yes" or "No" were rejected. Murphy v. San Luis Obispo (1898) 119 Cal. 624, 632, 51 Pac. 1085. Inasmuch as most officers and voters will instinctively follow the current methods used at general elections such provisions as are inserted in the ordinance on the subject should follow as nearly as practicable the provisions of the Political Code. See also the comment on fixing the date of canvassing returns under (5) Canvass.

[46] Skinner v. Santa Rosa, supra, n. 16. But a variance in denominations, as not imposing any different or greater burden, is immaterial. See infra, n. 57.

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be issued payable in lawful money or in gold coin.[47] The ballot, which should be provided for in detail in the ordinance calling the election, is said to require a statement in the proposition of the amount of the bonded indebtedness, though why this is so is not apparent from the statutes.[48] Precincts, polling places and officers of election should be stated in the ordinance.

Where several bond propositions are to be submitted at the same election, it should be remembered throughout the preparation of proceedings that some may carry and some may fail. In all such cases both in the initial resolution and in the ordinance all of the findings and determinations should be made separately as to each proposition and all of such matters as estimated costs, amount of principal of indebtedness, and objects and purposes should be separately stated as to each proposition. Rate of interest, coinage, and manner of holding the election and voting may by appropriate phrases be described in general language appropriate to all the propositions that carry at the election, and all bonds that carry may thereafter be lumped in one issue.[49]

(3) Publication of Notice.

The third essential step is the publication of the ordinance either in a daily paper or a weekly paper. Most problems seem to have arisen in connection with publication in a weekly paper, where the required publication is "once a week for two weeks

[47] Whether, when the statutes are silent, the legislative body has the implied power to issue bonds payable in gold coin rather than lawful money, must be deemed an open question. The supreme court avoided uttering *dictum* upon it in Derby v. Modesto, supra, n. 32, (citing cases). The language of our supreme court in this and other early cases construing statutes on the subject is very puzzling and perhaps hypertechnical.

If the ordinance calling the election says nothing regarding the medium of payment some conservative attorneys insist that "lawful money" is intended and assented to, so cannot thereafter be departed from. The writer feels that at least since the adoption of new section 13½ of Article XI, the fairer presumption is that the voters intended to leave the full discretion to the legislative body. Safe practice, however, bids one state in the ordinance the kind of coinage desired both as to principal and interest, then to stick to it. The medium of payment is not now so important to the purchaser as it was in the '90s, so there is seldom practical difficulty in selling "lawful money" bonds, and this is the course most unanimously approved by attorneys where the ordinance is silent. The coinage question may, however, revive in interest among investment circles and "gold coin" bonds are never less desirable then their brethren of the "lawful money" type.

[48] Clark v. Los Angeles (1911) 160 Cal. 317, 320, 116 Pac. 966, 967.

[49] Mill Valley v. House (1904) 142 Cal. 698, 76 Pac. 658, which points out, however, that separate treasury funds for the respective improvements must be maintained.

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. . . . and one insertion each week for two successive weeks shall be a sufficient publication. No other notice of said election need be given". Under the latter saving clauses, if publication be made on the 14th and 21st of the month, the election need not be delayed until the 29th, but can be held on or after the 22nd.[50] It seems that sample ballots need not be distributed, though the usual course and the preferable one, is to follow the Political Code sections regarding them.[51]

(4) Conduct of Election.

The fourth essential step is the holding of the election. Pertinent provisions of the Political Code vary so from time to time that no extended description is helpful. The election may be held on a holiday.[52] For reasons given above, the special provisions of the ordinance should be carefully noted by election officials, and particular care given by them to filling out all matters in the returns as these will be subject in many cases to careful scrutiny if the vote is close.

(5) Canvass.

The fifth essential step is the canvass of the returns by the legislative body. It may be doubted, in the light of the statute's silence on the subject, whether the holding of a canvass is a jurisdictional step. It is certainly an essential of orderly procedure, however, for the legislative body to determine in formal public fashion whether or not the contingency has happened upon which alone its power to issue bonds under the constitutional

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[50] City of Lindsay v. Mack (1911) 160 Cal. 647, 117 Pac. 924. Were it not for the saving clauses the answer would apparently be otherwise. Cf. Seccombe v. Roe (1913) 22 Cal. App. 139, 133 Pac. 507.

[51] *Effect of the Referendum.* In chartered cities it sometimes happens that special provisions regarding publication must be followed. Some charters also raise a troublesome difficulty in connection with their sections dealing with the referendum. These may provide for a referendum with a thirty day period elapsing before the ordinance becomes effective and neglect to except "ordinances calling or otherwise relating to an election". Apparently the proceedings are held up until this time elapses. Odd though it may seem that the voters may have the right to vote on whether or not a question shall be submitted to them, the supreme court considers it an open question. Los Angeles Gas & Electric Corporation v. Los Angeles (1912) 163 Cal. 621, 126 Pac. 594, and cases cited. In such cases it may not be necessary to allow thirty days to elapse from first publication and then publish further to comply with the statute regarding the notice of election. Even before the ordinance is effective as an ordinance it seems likely that it is good as a notice. See Los Angeles v. Teed, supra, n. 10.

[52] People v. Loyalton (1905) 147 Cal. 774, 82 Pac. 620.

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provision depends. On the question as to when it is to be held, neither law nor authority furnishes a sure compass. Some bond attorneys insist that the analogy of section 1278 of the Political Code should be followed and the canvass made on the first Monday after the election. Others prefer that the canvass be made at the first regular meeting of the legislative body after the election, or at a special meeting. It is wise, therefore, to provide in the ordinance calling the election as to the hour, date and place of holding the canvass, and if the date so selected follow the analogy of the said code section all examiners of the bond proceedings will then apparently be pleased.

(6) Ordinance of Issue.

When it has been determined that the bonds have obtained the requisite number of votes, the board may proceed by legislative act, either ordinance or resolution, to provide the discretionary detail as to the issuance of the bonds. Here arises an important condition precedent, viz., the limitation of section 4 of the act that no city shall incur an indebtedness for public improvements which shall in the aggregate exceed fifteen per cent of the assessed value of all the real and personal property of such city. In applying this salutory limitation, it should be noted that the indebtedness covers not only bonded indebtedness, but all indebtedness of the city for public improvements. The Vrooman Act bonds and similar obligations are presumably not included because not direct indebtedness of the city, but only claims against special district funds. That only the principal of indebtedness and not the interest counts is fairly certain.[53] Not the date of election, but the date of sale and delivery is important in measuring the percentage.[54] The assessed value is probably that of property subject to taxation to pay principal and interest of the bonds, so operative property of public utility corporations that pay the constitutional tax under section 14 of Article XIII should not be included.

The legislative body at this point is allowed to act either by ordinance or resolution, the act making no specific direction. Prior to the constitutional amendment and statutes regarding the referendum, cities commonly used the resolution to save time, for

[53] Carlson v. Helena (1909) 39 Mont. 82, 102 Pac. 39.

[54] Clark v. Los Angeles (1911) 160 Cal. 30, 45, 116 Pac. 722, and cases cited.

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the ordinance of issue, unlike the ordinance calling the election, is subject to all formalities prescribed by general law applicable to ordinances of the particular municipality. Since the adoption of the referendum provisions of the constitution, it has been held that all municipal legislative acts, (barring those specially excepted) must await the thirty days from adoption before becoming effective whether they be in the form of ordinances or resolutions.[55] It is an open question whether or not the ordinance of issue is strictly speaking a legislative act. The highly important discretionary powers exercised thereby and the general nature of their effect make it likely that it would be held legislative. No substantial practical advantage, therefore, inheres in the use of the resolution and the safer practice is to use the form of ordinance.

The following points should be given special attention in preparation of the ordinance of issue.

(a) *Maturities of the bonds.* The practically universal custom is to make an equal amount and number of bonds payable each year within the limitation of not exceeding forty years for the last maturities. In all bonds, except those for revenue producing utilities, the first annual installment must mature within one year. Must an equal amount of principal mature each year? In the case of bonds for the revenue producing utilities where the first maturity is deferred for over a year, the statute requires equal maturities. The only provision for the other varieties is that not less than one-fortieth mature each year. It has been held that within such limits the maturities may differ in amount.[56]

(b) *Denominations.* Within the statutory limits of one hundred to one thousand dollars the legislative body has full discretion and even a change from the denominations stated in the ordinance calling the election is an immaterial variance.[57]

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[55] Chase v. Kalber (1915) 28 Cal. App. 561, 153 Pac. 397; Hopping v. Richmond (1915) 170 Cal. 605, 150 Pac. 977.

[56] Town of Calistoga v. Adams (March 11, 1918) 26 Cal. App. Dec. 536, 172 Pac. 624. The case was uncontested. It was not clear that this case will be universally followed. The fact that a reasonable division leaves an unequal amount for the final maturities seems immaterial. San Diego v. Potter, supra, n. 26.

[57] Santa Barbara v. Davis (1907) 6 Cal. App. 342, 92 Pac. 308; Derby v. Modesto (1894) 104 Cal. 515, 38 Pac. 900; Law v. San Francisco, supra, n. 12. For purposes of general marketability the thousand dollar denomination is easily favorite, and small denominations should not be issued except for good cause. Smaller denominations are generally treated on the exchanges as "baby bonds" not deliverable in performance of an order unless so specified.

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(c) *Coinage.* The principles involved have already been stated. If the ordinance calling the election states lawful money, or gold coin, it should be followed; if it is silent it is safer to say lawful money, though some conservative attorneys will approve bonds issued calling for gold coin.

(d) *Interest.* For some reason not obvious the interest must be payable semi-annually, that is to say, in two equal parts each year, one-half a year apart, commencing with the date of the bonds.[58]

(e) *Form of bonds and coupons.* This should be expressly set forth in the ordinance. Recitals of the regularity of the important steps in the issue add to the marketability of the security,[59] because these recitals tend to cure certain irregularities in the proceeding when the bonds come into the hands of a bona fide purchaser. Either in the form of the bond or elsewhere in the ordinance the date that the bonds are to bear must be fixed. This date, of course, should not be subsequent to the expected date of sale and delivery. Apparently the bonds can be antedated to a time even prior to the date of the election,[60] though obviously such a course might destroy the full value of the recitals. It has also been held that the date finally selected may differ form the date stated in the ordinance calling the election.[61]

(f) *Signatures.* The specific provisions of the statute must of course be followed. The persons signing must be acting officers at the time they actually sign;[62] and if they are such, under the statute, it is immaterial that they are no longer such officers at the time of sale and delivery.[63] The miscellaneous stat-

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[58] No such limitation applies in respect of school district bonds. If the city could find a purchaser on an annual interest basis its burden might well be smaller.

[59] See Waite v. Santa Cruz (1901) 184 U. S. 302, 314, 46 L. ed. 552, 22 Sup. Ct. 327, which also at page 304 gives a good form of such usual recitals.

[60] Venice v. Lawrence (1914) 24 Cal. App. 350, 141 Pac. 406.

[61] Oxnard v. Bellah, supra, n. 41. In many instances such a variance is immaterial but it is not hard to suppose cases where the taxpayer could show that his interests were injuriously affected by the change.

[62] See Lehman v. San Diego (1897) 27 C. C. A. 668, 83 Fed. 669. Should the ordinance passed, say, on April 1st fix the date of the bonds April 1st, and if thereafter new officers qualified before the bonds were ready for signature, the new officers should of course sign regardless of the discrepancy in date. See also on the general subject O'Neill v. Yellowstone Irrigation District, supra, n. 17.

[63] It is almost universally desirable to use lithographed or engraved signatures on the coupons. If this is to be done the authority should be given the officers either in the ordinance of issue or by resolution.

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utory provisions regarding such matters as numbering and sealing should be precisely followed.

(g) *Provision for levy of tax.* As already noted the constitutional requirements are complied with by the terms of the statute itself. Custom approves of the insertion in the ordinance of specific provision for the levying of the taxes and it furnishes a safe guide for taxing officials who may overlook the statute.

(h) *Provision for bond funds.* At least for the convenience of taxing officers it is wise to provide specifically not only for the fund into which the tax revenue is placed, but separately for the fund or funds into which the moneys received from sale of the bonds shall be placed. Confusion may result unless the separate funds are respectively given a handy name or number.

(7) Sale of Bonds.

The final step to which comes the legislative body, who have so far been successfully led, is the sale of the bonds. They may be sold by the legislative body as it determines, but for not less than par. By par is meant the face value plus interest accrued from the date the bonds bear until the date they are delivered.[64] Unless the board has limited its own powers by prescribing by ordinance the manner of sale, it may sell at public or private sale and with or without notice. Where the ordinances or charter prescribe the form of notice or manner of sale, that must be followed. As a matter of good business judgment the legislative body by resolution generally directs the clerk to advertise asking bids to be offered up to a given date and hour, but reserving the right to reject any and all bids, and requiring a deposit as evidence of the bidder's good faith conditioned on his performance of his offer if accepted. Such advertisements are closely followed by the bond houses and generally result in more and better bids being received than if no advertisement is made.

Where the sale is public and on notice, the legislative body should be met in regular, adjourned, or special session at the time of opening bids, and if the highest bid is satisfactory, should pass a resolution accepting such offer and directing the

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[64] Village of Fort Edward v. Fish (1898) 156 N. Y. Supp. 363, 50 N. E. 973.

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treasurer to deliver the bonds to the purchaser upon payment of the principal, accrued interest, and premium, if any.[65]

The legislative body need not sell all of the bonds at one time; and where part of the money will not be needed for several months it is often good business to sell only a part. In so splitting the sale, however, care must be exercised to sell the part in series such that the part outstanding will comply as to maturities with the provisions of the statute and ordinances, for it may well happen that the balance will never be issued.

It is sincerely to be hoped that in due course of time the experience of cities in issuing and taxing for bonds may result in an increased confidence on the part of the legislature producing a radically simplified form of procedure. It is by no means clear, however, that such time has yet arrived.

Sayre Macneil.

Los Angeles, California.

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[65] The customary form of bid will be conditioned upon the city's furnishing a certified copy of the proceedings such as to evidence to the satisfaction of the buyer's attorneys the validity of the bonds. This form of conditional bid is to be differentiated from the unconditional form where the buyer is presumably already satisfied with the regularity of the proceedings. Even where the bid is unconditional it seems highly questionable that the city can enforce the bargain if the bonds are in fact invalid. The value of the conditional bid is that the purchaser need not depend upon the decision of the higher courts that the bonds are good or bad, but can reject them in case of his attorney's honest and uncapricious doubt as to their validity. San Antonio v. Rollins (1910) 127 Tex. C. A. 1199, 127 S. W. 1166; Great Falls v. Theis (1897) 79 Fed. 943. For a more extreme doctrine see Trowbridge v. New York (1898) 24 Misc. Rep. 517, 53 N. Y. Supp. 616; Coffin v. Portland (1890) 43 Fed. 411; Fort Edward v. Fish (1895) 86 Hun. 548, 33 N. Y. Supp. 784. It is not settled whether the usual conditional bid is conditioned also upon the due incorporation of the issuing power, though it seems that the proper doctrine is that either *de jure* or *de facto* incorporation is essential to good bonds. Metcalfe v. Merritt (1910) 14 Cal. App. 244, 111 Pac. 505, uses language against the applicability of the condition though it held the district was a good *de facto* district. People v. Linda Vista Irrigation District (1900) 128 Cal. 477, 485, 61 Pac. 86, holds that in any direct attack on the validity of bonds the organization of the issuing public corporation is open to question.

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The Sheriff and the Justices of William Rufus and Henry I.

AUTHORITIES on English constitutional history clearly recognize that the early itinerant justices were fiscal as well as judicial officials, although the usual approach to their activities has been from the judicial side. A strong reason for the use of the eyre is explained by an examination of methods in royal finance.[1] The frequent and regular employment of the justice upon local mission is associated with the collection of revenues at large from judicial and other sources necessarily variable in amount and not included in the fixed *ferm* paid by the sheriff of the shire.

It is easy to slight the part which the justices played in the dispatch of non-judicial business. The Assize of Northampton[2] in the time of Henry II provides that they are to receive oaths of fealty to the king, direct the render of homage and fealty to him, and see that certain castles are levelled to the ground. The Assize of Arms[3] shows how in the same reign they employed knights and freemen to assess upon oath the value of chattels in each community in order to fix the military responsibility of its members; and they also forbade the export of timber and the purchase or sale of ships to be taken from the kingdom. The Pipe Rolls of the reign furnish abundant evidence that they levied tallages and directed the sheriff in the performance of various administrative duties.[4] The heads of the pleas of the crown in the reign of Richard I[5] present a large and familiar range of duties laid upon them, most of which had to do with the king's financial rights rather than the administration of justice in any ordinary sense. The justices had not only come to control the sheriff in ways that are well understood. They had actually superseded him in the exercise of powers which he possessed in the early Norman period; for the Domesday sheriff, who was almost a viceroy, largely monopolized judicial, police, fiscal and administrative functions within his shire. Here, then, is a point of departure for tracing the rise of the justices.

[1] Stubbs inclined to the view (*Benedictus* II. p. viii) that it was at first a fiscal journey to assess tallages.

[2] §§ 6. 8.

[3] §§ 9, 12.

[4] It is but rarely, however, that an itinerant justice is to be found in these records who devotes himself to exchequer business alone.

[5] See Adams and Stephens, Select Documents, no. 21.

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First of all, a comparison may be made between certain usages set forth in the *Dialogus de Scaccario* and those deducible from a document some forty-five years older, the Pipe Roll of Henry I. According to the *Dialogus*[6] it is one of the difficult but important problems of the exchequer to determine whether the sheriffs who collect various kinds of accounts in different ways have acted as they should. The amount of *ferm* which they owe for their shires is of course known, and the amount of *Danegeld* can obviously be computed by the aid of records. But many debts due from individuals and communities must be acquitted according to the sheriff's statement unless some means of verification can be devised. Such accounts include *murdra* paid by hundreds, aids levied upon towns, and the income from the pleas of the crown. The check is provided by the rolls kept by the itinerant justices[7] which enable the exchequer officials to make demand upon the sheriff[8] for the exact amount of these several debts. The sheriff then a day or so in advance notifies those whose accounts he is settling at the exchequer, a procedure designed to assure publicity of accounts.[9] The eyre and the roll of its proceedings make the king secure concerning essential portions of his income.

Did similar methods of accounting prevail in the year 1130 when the Pipe Roll of Henry I affords a glimpse of that king's fiscal system? The close correspondence in form between this record and the later Pipe Rolls is sufficient proof that the *Dialogus* is correct in representing the exchequer system of Henry II as a restoration[10] of that of Henry I. Exchequer usage in 1130 repeats the main details already discovered in the *Dialogus*. The justices in Yorkshire, Walter Espec and Eustace fitz John, already authorized the sheriff to make certain expenditures in restoring the king's manors.[11] The sheriff accounts for *murdra* and the aids of towns and counties, and the itinerant justices have visited many shires of the realm within the year. Nothing is said as to their keeping rolls, but officials who keep the pleas of the crown are mentioned more than once in this period. Over a decade earlier

[6] Oxford ed., I, iiii C.
[7] Ibid., II, i C.
[8] Ibid., II, xii A.
[9] III, iv E; p. 215.
[10] Ibid., I viii G.
[11] Pipe Roll 31 Henry I., p. 24.

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it was already a maxim of law that no man might dispute the *recordatio* of the king's court.[12] In the Pipe Roll of 1130 specified sums due from *placita* and agreements before the justices are being demanded and paid at the exchequer. It has been doubted whether the sheriff as a rule collects these from individuals.[13] But one Ulwinus de Bedewinda[14] claims that he has turned over to the sheriff money that is due *de placitis*. Since the account stands in his name, not in the sheriff's, one may conclude again that usage is similar to that in the *Dialogus* and that the sheriff is the usual collector. But notwithstanding this fact, the evidence that the justices have reduced his independence in fiscal affairs is strong. Sir James Ramsey has shown[15] that less than half of the revenue for this year was derived from the fixed sums which were included in the sheriff's farm.

The necessity of a counterfoil to the sheriff is especially clear because of the importance attached about 1130 to the revenues derived from pleas of the crown. It is well known that the justices were already making these a grievous means of extortion.[16] Nor does anything novel appear in such organized exploitation. Ralph, the chancellor of Henry I, who died in 1123,[17] and three of the best known justices of the king's *curia*, Ralph Basset, Hugh de Bochland and Geoffrey de Clinton,[18] are among those accused of unjust oppression in a connotation which suggests judicial zeal in maintaining the king's material interest. A similar charge against two of the itinerant justices of 1130, Miles of Gloucester and Payn fitz John,[19] is connected with the holding of pleas. It is significant that the author of the *Leges Henrici* by 1118 at the latest had made a careful study of the pleas not included in *ferms*[20] the income from which went *in toto* to the king. This was a form of royal income readily capable of expansion.[21] Bishop Herbert de Losinga, apparently in 1107, complained to Roger of Salisbury, the justiciar, that fifty pounds in pleas had been levied upon his lands

[12] *Leges Henrici*, 31:4; 49:4.
[13] Ramsay, Foundations of England, II, 328.
[14] P. 20.
[15] Foundations, II, 328.
[16] Round, Geoffrey de Mandeville, 105.
[17] Henry of Huntingdon, Rolls Series ed., 244.
[18] *Ordericus Vitalis*, ed. Prevost, IV, 164-66.
[19] *Gesta Stephani*, Rolls Series, 16.
[20] § 10 and *passim*.
[21] The writer of the *Gesta Stephani*, Rolls Series ed., 17, complains that King Henry enmeshed the clergy *placitis et legibus*..

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although his men had committeed no offense.[22] The demand, significantly enough, was accompanied by one for military aid. In the earlier years of this reign as well as in the later years of William Rufus the Anglo-Saxon Chronicle frequently complains of high taxes which are sometimes laid for military purposes. These serve as a reminder that war revenues must be secure revenues, and that the reputation of the Norman sheriff could hardly offer much assurance in this regard.[23] The systematic misuse of the judiciary for fiscal purposes certainly dates from the reign of William Rufus, this being a well-known device[24] of Ranulf Flambard. It is stated that the king made Ranulf *exactor* and *placitator* of the whole realm. The Charter of Liberties of Henry I indicates that chattels had been seized to satisfy these unjust claims, and that many of the debts which the new king pardoned at his accession had arisen through oppression of this kind.

How much earlier than 1130 the exchequer was able to make regular use of the itinerant justices in levying and collecting the king's revenue it is impossible to say. The Pipe Roll of that year mentions amounts due from *placita* held by Ralph Basset, a prominent justice probably deceased somewhat earlier. The special session over which he presided at Huncote in Leicestershire in 1124[25] seems to be the earliest which is definitely recorded as transacting criminal business. There appears no good reason for holding that the frequent and systematic mission of judges from the king's *curia* was much older. It may be assumed that the justices who execute local commissions in the reign of William the Conqueror[26] usually deal with but one cause. Known instances of more extended activity in this and the ensuing reign number but three. Despite the appointment in 1095, and possibly again in 1096, of an itinerant commission *ad investiganda regalia placita* the justices from the *curia* as a rule can scarcely be disposing of fixed administrative routine. Indeed the *Leges Henrici* and the *Leges Edwardi Confessoris* clearly assume that the king's justice is a local resident ordinarily within reach when crimes are committed.[27] It has been sug-

[22] Goulburn and Symonds, Life of Herbert de Losinga, I, 229.
[23] See English Historical Review, XXXIII, 170-73.
[24] Florence of Worcester, Eng. Hist. Soc., II, 46.
[25] Anglo-Saxon Chronicle.
[26] Yale Law Journal, XXIII, 470-607.
[27] *Leges Henrici*, 75:6a; 91; 92:4a. *Leges Edw. Conf.*, 15; 20:1a; 20:6.

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gested, and the suggestion may be accepted with confidence, that the *leges* sometimes refer to the sheriff when they mention the justice.[28]

But it is certain that the local king's justice was not always the sheriff. Henry I in accord with usage employed by him also in Normandy[29] actually gave appointment to special local justices. Besides the well-known *iustitiarius* of London and Middlesex,[30] who belongs to the later years of the reign, there is mentioned a *justicia* of Cornwall and Devon.[31] A writ form, newly modified in this reign, is addressed to justices as well as sheriffs in documents of the type heretofore directed to the county court. According to the account given in the Ramsey Chartulary[32] the sheriff and the justice of the shire were associated as parties in a case against Abbot Aldwin involving possession of a certain great fish which the two officials wished to claim for the king. The *Leges Henrici*[33] show that in the second decade of the reign either the justice or the sheriff might try offenders for theft, robbery, arson and other crimes. The fact agrees well with the accepted view that the local justices took over from the sheriff the pleas of the crown,[34] ultimately to surrender them to the itinerant justices. That the local rather than the itinerant justice was acting in these matters seems to be shown by the general similarity of the office of the former to that of the coroner of a subsequent period, a similarity which was brought out by Professor Gross[35] and which demands insistence. Thus, according to the *Leges Edwardi Confessoris*,[36] the *justicia regis* had to do with the abjuration of the realm by criminals, and consequently performed a function of the thirteenth century coroner. Again, he had control[37] over the bodies of persons who met death in an unknown manner. He also bore the judicial responsibility of the thirteenth century coroner. As to the capacity in which one Benjamin kept pleas of the crown in Norfolk in 1130

[28] Liebermann, *Ueber die Leges Edwardi Confessoris*, 73; Amer. Histor. Rev., VIII, 490.
[29] Haskins, Norman Institutions, 100.
[30] Round, Geoffrey de Mandeville, 110, 373.
[31] Davis, Normans and Angevins, 523.
[32] Rolls Series, I, 149.
[33] 66:9.
[34] Round, Geoffrey de Mandeville, 373; Davis, Normans and Angevins, 138, 523.
[35] Pol. Sci. Quar., VII, 656-72; Sel. Coroners' Rolls, introd. pp. xv-xvii.
[36] 18:2.
[37] *Leges Henrici*, 92:12.

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there is difference of opinion. But the *iustitiarius* of London and Middlesex, mentioned above, had authority not only to do this but sole authority to try such pleas, thus excluding the sheriff from this function. The local justice, then, was apparently the precursor, just as at a later time the coroner was the helper, of the itinerant justice in safeguarding the king's fiscal interest. So far as record goes he was the royal agent who first permanently weakened the position of the powerful Norman shrievalty.

To attribute the existence of the local and the itinerant justice solely to fiscal motives would ignore other important factors in the case, such as the increase in the direct authority of the crown and the popularity which accrued to Norman rule through the maintenance of a firm peace; but the financial aspect of the problem was of major consequence. Attention may be called to another consideration which points to this conclusion. Evidence presented by Mr. H. W. C. Davis makes it probable that the local justice originated before the reign of Henry I. One particular form of diplomatic evidence upon which Mr. Davis appears to rely to prove this,[38] and which might tend to show that the office dates from the Conqueror's reign, is inconclusive.[39] Yet justices not clearly "justiciars of England"[40] are mentioned by title in writs of William Rufus[41] and a justice of this king locally tries a case[42] of a kind which probably does not require the presence of a special curial representative. Ralph Passelewe, known as *justitiarius* of Norfolk in the reign of Henry I, seems to have held this position before August, 1100. Mr. Davis finds that a certain cause tried during Ralph's justiciarship may date as early as 1091, though not later than 1102;[43] it may be added that in the reign of William Rufus he is found holding a Norfolk plea[44] which involved a five pound *forisfactura*, presumably a crown plea which the king had granted away. The present writer has elsewhere[45] made use of a passage which to him seems to point to the existence of this office in

[38] Davis, *Regesta*, introd. pp. xxx-xxxi.
[39] Ibid., I., no. 59.
[40] Ibid., no. 424.
[41] Ibid., nos. 366, 389, 448.
[42] Davis, Normans and Angevins, 520; *Monasticon*, I., 143.
[43] Normans and Angevins, 523; Ramsey *Cart.*, I Rolls Series ed., 149.
[44] Ramsey Chronicle, 211; Davis, *Regesta*, nos. 373, 448.
[45] English Histor. Rev. XXXIII, 159.

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the reign of Rufus. An Abingdon chronicler[46] in writing of this reign describes Hugh de Bochland as both sheriff of Berkshire and justiciar of public summonses (*compellationes*) appointed by the king. The latter portion of the title hardly refers to Hugh's work at the king's *curia*, and the designation contrasts strongly with that of "justice in the whole realm of England," which Ralph Basset bears in the same work.[47] On the other hand, Hugh's two offices seem to be on much the same level, and the appointment of this official associate of Flambard to the office of local justice is to be expected quite as much as his occupancy of the shrievalty of his county. A beginning of the segregation of the two offices would be easiest in this sort of case. The most probable interpretation of the passage is that this has taken place. On *a priori* grounds the use of the local justice fits into the fiscal scheme of Flambard just as the itinerant justice belongs to the exchequer system of 1130. The main fiscal idea perpetuated in the eyre is to be traced back to the earlier period, and in the light of recent research[48] an improvement of curial methods of accounting in the reign of William Rufus is far from improbable. It is at least a highly interesting coincidence that this early use of the local justice associates itself with the ministry of a man, reputed the great extortioner of his age, who drove his *gemots* over all England.

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[46] *Chron. Monast. Abingdon*, Rolls Ser., II, 43.
[47] II, 170.
[48] Eng. Histor. Rev. XXXII, 101-06.

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Government Ownership and the Maritime Lien

(To L. E.)

I.

GOVERNMENT ownership and operation of merchant vessels is a matter of great importance to those who, in dealing with such vessels willingly or unwillingly, become the possessors of claims which formerly could have been speedily enforced in the courts against private individuals and their vessels. Men whose relation to public carriers is confined to safe rides as a passenger may cry for government ownership, but not necessarily the man who finds he has that government for debtor. While his claims have in fact and so far as possible been settled on the same basis that a private individual might have settled, nevertheless if there is a change in policy there develops toward him the usual bureaucratic attitude of governments in business, and his position may be a hard one, particularly in England and the United States, where the theory that the State cannot be sued and is not accountable for its acts is strongly entrenched in the legal system. Indeed, it is not improbable that the absence of a prompt and expeditious remedy may deter the shipper from shipping his goods on government vessels, the sailor from signing articles for service upon them, the salvor from salving them, the charterer from chartering them, and the chandler and repairer from supplying and repairing them on any but disadvantageous terms; while he whose ship is in collision with a government merchant ship, will be even worse off, for he cannot avoid the thing that runs him down. So far as is possible, these men will very likely turn to private vessels, including those of foreign competing nations, where such a remedy still exists, particularly in the suitable and compelling form of the maritime lien or right in rem.

It is true that Mr. Hurley has recently announced a programme contemplating a form of private ownership.[1] Vessels constructed by the Emergency Fleet Corporation and now owned by the United States are to be sold to American citizens, payment to be made in annual installments, with unpaid balances secured by a mortgage to the United States, which is to be

[1] The Nautical Gazette, March 29, 1919, pp. 220, 213.

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represented on the board of directors of the purchasing company, and is to have power to prescribe the routes over which the vessel is to be operated. But it is hinted that a change in the law may be sought in order to give mortgages precedence, not now existing, over the ordinary maritime lien so that they may be more attractive to investors. In any event, since the scheme may meet the objection of those who advocate government ownership, as well as those believing in private ownership pure and simple, there is a doubt whether or not it or its equivalent will be adopted for a long time.

It is easy enough to pronounce as Judge Mayer has done in the Maipo:[2] "It is said great loss and inconvenience may be visited upon the many kinds of people who deal with a vessel thus immune, and that American citizens will be put to the trouble and expense for claims, large and small, of seeking their relief in far-distant foreign jurisdictions. The answer is that, when one knows with whom he is dealing and the law applicable, he must arrange accordingly. This may be difficult, but in these days of rapid changes, accommodation to new conditions is accomplished effectively and expeditiously." While this was said with reference to foreign owned vessels, nevertheless American citizens may also have to "arrange accordingly" with vessels of their own government. If their remedies are not clear, they may so arrange, either by not dealing with such vessels at all, or by refusing to give credit, or by making high charges, when in a position to do so, to discount the imperfect remedy. None of these practices are particularly favorable to the growth of commerce and a merchant marine. However, the matter is arranged, those who must deal with government vessels may be, as a practical matter, in an extremely difficult situation, particularly if a prophecy of this same Judge[3] becomes universally true: "Indeed, it would not be surprising if at no distant date large numbers of vessels setting out from various ports of various countries would be manned as government vessels for the very purpose of assuring quick clearance and freedom from process."

It is outside my purpose to consider the broad question of a State's liability.[4] All I shall attempt will be an exposition of the

[2] (So. Dist. N. Y., 1918) 252 Fed. 627, 630.

[3] *Idem*, p. 631, but cf. the court's view in The Attualita (Circ. Ct. App., 4th Circ., 1916) 152 C. C. A. 43, 238 Fed. 909, and in The Crimdon (Prob. Div., 1918) 35 T. L. R. 81.

[4] See on this subject a very instructive article which, in spite of

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present law as to the existence and enforceability of the maritime lien on government-owned and operated merchant vessels of the United States, and then to an examination of some of the theories advanced. It will appear that the existing law is incomplete, confused, and unprepared to meet the problem, which has come to us together with our new merchant fleet, still government-owned, and perhaps permanently so,—at least in part. The clarification of the situation, by legislation if necessary, is one of the many duties of readjustment before us, and this article is written in the hope that it may at least stimulate an interest in a solution.

That the question is an important one is shown by certain recent cases.[5] It is true that in most of these a vessel of a foreign friendly power was concerned, but the decisions are important, for the courts have often treated the matter no differently than they would have done if the vessel were one of our own. And, furthermore, cases involving our own ships are now pending in the Supreme and District Courts.[6]

What, then, is the present state of the law in the United States as to the existence and enforceability of a maritime lien upon a government-owned merchant vessel? In other words, is the shipper, the sailor, the salvor, the charterer, the chandler, the ship-repairer, and the host of others who deal with ships, without the rights he formerly had?

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its title, refers to decisions in the United States: Laski, The Responsibility of the State in England, 32 Harvard Law Review, 447; and see also, covering somewhat the same ground as the present article, Charles H. Weston, Actions Against the Property of Sovereigns, 32 Harvard Law Review, 266, for an analysis of many of the cases here referred to.

[5] The Roseric (Dist., N. J., 1918) 254 Fed. 154; The Maipo, supra, n. 2; The Pampa (E. Dist. N. Y., 1917) 254 Fed. 137; The Attualita, supra, n. 3; The Johnson Lighterage Co. No. 24 (Dist. N. J., 1916) 231 Fed. 365; The Luigi (E. Dist. Pa., 1916) 230 Fed. 493. For a discussion of this subject see Charles N. Gregory, Jurisdiction over Foreign Ships in Territorial Waters, 2 Michigan Law Review, 333, 337; also note, 24 Harvard Law Review, 489. Cf. The Athanasios (So. Dist. N. Y., 1915) 228 Fed. 558, and The Florence H. (So. Dist. N. Y., 1918) 248 Fed. 1012, this last being the only case against an American merchant vessel of the United States and depending on a questionable interpretation of the Shipping Act; § 9 (Act of September 7, 1916, ch. 451, 39 U. S. Stats. at L. 728.)

[6] A decision, too recent to be verified before this article goes to press, is reported to have been rendered by Judge Bean in the United States District Court, Oregon, holding that a merchant vessel built for the United States by a private builder under contract with the Emergency Fleet Corporation, and still in the builder's possession, cannot be attached. The Portland Journal, April 22, 1919.

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II.

It is clearly settled that a public armed vessel of a State whether domestic or foreign, cannot be seized upon a libel for collision,[7] or for salvage[8] or other maritime cause.[9] This rule has also been applied in the case of a vessel used as an admiralty transport, possibly only for cargo and not for troops,[10] and to a military vessel engaged in carrying supplies to the army and transporting troops, not a part of the navy, but operated wholly by the War Department.[11] So far all is clear enough, but when we come to vessels not actively engaged in connection with navy or army, but used by the government for some other governmental purpose, the matter is not so clear. It has been held that a vessel intended to be used as a revenue cutter may be libeled for salvage,[12] or for materials and supplies.[13] On the other hand, with regard to vessels owned and operated by municipal corporations, no libel was permitted of a vessel used to transport pris-

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[7] The Pizarro v. Matthias (So. Dist. N. Y., 1852) 10 N. Y. Obs. 97, Fed. Cas. No. 11,199; The Parlement Belge (1880) L. R. 5 Prob. Div. 197, 205, 207, *dicta.* Cf. The Athol (High Ct. Adm. 1842) 1 W. Rob. 374, a troop ship, and The Pampa, supra, n. 5, a transport of the Argentine Navy manned by members of the naval forces, engaged in carrying cargo for private persons at the time of the collision.

[8] The Constitution (1879) L. R. 4 Prob. Div. 39; The Prins Frederik (High Ct. Adm. 1820) 2 Dods. 451. Cf. The Alexander (High Ct. Adm. 1815) 2 Dods. 37. Salvage may be recovered under the Tucker Act; (Act of March 3, 1887, ch. 359, 24 U. S. Stats. at L. 505. See Judicial Code (1911) §§ 24, par. 20, 145.) Hartford Trans. Co. v. United States (Circ., Dist. Conn., 1905) 138 Fed. 618.

[9] Domestic vessels, Moitez v. The South Carolina (Adm. Pa., 1781) Bee 422, Fed. Cas. No. 9, 697; foreign vessels, The Cassius (1796) 2 Dall. 365, 1 L. Ed. 418; The Exchange (1812) 7 Cranch. 116, 3 L. Ed. 287; L'Invincible (1816) 1 Wheat. 238, 4 L. Ed. 234. Cf. The Santissima Trinidad (1822) 7 Wheat. 283, 5 L. Ed. 454. The French law is to the same effect—*"les bâtiments de guerre et assimilés"* cannot be seized. Edmund Thaller, *Traité Général Théorique et Pratique de Droit Commercial, (Droit Maritime par* Georges Ripert), Paris, 1913, p. 713, § 892.

[10] The Roseric, supra, n. 5, a British vessel.

[11] The Thomas A. Scott (Dist. N. Y., 1864) 90 Fed. 746, 10 L. T. N. S. 726.

[12] Long v. The Tampico (So. Dist. N. Y., 1883) 16 Fed. 491. Cf. Five Steel Barges (1880) L. R. 15 Prob. Div. 142.

[13] The Revenue Cutter No. 2 (Dist. Ore., 1877) 4 Sawy. 143, Fed. Cas. No. 11,714, but the vessel had not been accepted by the United States. And see The Revenue Cutter No. 1 (Dist., No. Dist. Ohio, 1860) Brown Adm. 76, Fed. Cas. No. 11,713, where a state lien for construction was enforced without discussion of immunity as property of the United States.

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oners to jail and the sick to public hospitals,[14] or of a tug and dredge engaged in dredging a municipal port,[15] or of a police boat,[16] or of an ice breaker used also for towing and lightering,[17] but the question was perhaps considered as open in the case of a fire-boat.[18] It has also been announced that a light-ship or a vessel to be used in connection with lighting a harbor were not subject to libel,[19] and as to vessels owned by the government and used for carrying the mail, it has been held that such vessels, which also carried passengers, could not be libeled for a collision.[20]

Now coming to vessels used purely as merchantment, we reach the gist of the matter. Liens upon merchant prizes arising out of events occurring after their capture can be enforced in the

[14] The Fidelity (Circ., So. Dist. N. Y., 1879) 16 Blatchf. 569, Fed. Cas. No. 4758.

[15] The John McCraken (Dist. Ore., 1906) 145 Fed. 705, but the municipal corporation is liable *in personam*: United States v. Port of Portland (Dist. Ore., 1906) 147 Fed. 865. Further of the liability *in personam* of a municipal corporation see Barney Dumping-Boat Company v. Mayor, etc. (So. Dist. N. Y., 1889) 40 Fed. 50; Edgerton v. Mayor, etc. (So. Dist. N. Y., 1886) 27 Fed. 230. But cf. Haight v. Mayor, etc. (So. Dist. N. Y., 1885) 24 Fed. 93.

[16] The Protector (Dist. Mass., 1884) 20 Fed. 207, collision, the Seneca (Dist., E. Dist. N. Y., 1876) 8 Ben. 509, Fed. Cas. No. 12,668, wharfage. A boat owned by a state and used for policing oyster plantations was held subject to forfeiture for breach of the navigation laws. The Oyster Police Steamers of Maryland (Dist. Md., 1887) 31 Fed. 763.

[17] The F. C. Latrobe (Dist. Md., 1886) 28 Fed. 377, but held that the municipal corporation is liable *in personam;* and also so held in The Major Reybold (E. Dist. Pa., 1901) 111 Fed. 414, even though the ice boat was at the time being used in connection with a parade of the G. A. R.; and in City of Philadelphia v. Gavagnin (Circ. Ct. App., 3rd Circ., 1894) 62 Fed. 617, where the ice boat was towing a vessel outside the state. *Contra,* Guthrie v. City of Philadelphia (Dist., E. Dist. Pa., 1896) 73 Fed. 688, *dictum,* where the ice boat was acting outside the state.

[18] Workman v. New York City, Mayor, Aldermen, and Commonality (1900) 179 U. S. 552, 572, 45 L. Ed. 314, 324, 21 Sup. Ct. Rep. 212, 219. But in Thompson Navigation Co. v. City of Chicago (Dist., No. Dist. Ill., 1897) 79 Fed. 984, there is a *dictum* to the effect that there is no enforceable lien. Liability *in personam* was decreed in these cases and in Henderson v. City of Cleveland (Dist., No. Dist. Ohio, 1899) 93 Fed. 844; Island Transp. Co. v. Seattle (Dist., W. Dist. Wash., N. D., 1913) 205 Fed. 993; City of Chicago v. White Transp. Co. (Circ. Ct. App., 7th Circ., 1917) 243 Fed. 358.

[19] Cf. Briggs v. The Lightboats (Mass., 1865) 11 Allen 157, to enforce a state construction lien; United States v. Morgan (Circ. Ct. App., 4th Circ., 1900) 99 Fed. 579, *dictum.* A claim for "extraordinary towage" of a light-ship was allowed in a proceeding under the Tucker Act, The Viola (Circ. Ct. App., 3rd Circ., 1893) 55 Fed. 829.

[20] Cf. The Jassy L. R. (1906) Prob. Div. 270; Young v. S. S. Scotia (1903) A. C. 501; The Parlement Belge, supra, n. 7; and see The Merchant (Dist., So. Dist. Fla., 1851) 4 Adm. Rec. 544, Fed. Cas. No. 9435, where it was held that government mail was not liable for salvage.

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condemnation proceedings,[21] but not by an independent libel,[22] for the obvious reason that the necessary proceeding by which their title is adjudicated would be prejudiced. In a case decided just after the civil war concerning a vessel in the service of the government and under a charter by which the government was to coal her, but the owner still to operate her, a libel in rem for a collision was sustained on the merits, no question of jurisdiction being raised,[23] and a vessel under charter to the United States not amounting to a demise was held liable on a bottomry bond.[24] It was specifically held in 1916 that a vessel in the possession of her owner, who was required, however, to navigate her as the government directed and to carry such cargo as it ordered at a fixed charge, could be libeled for collision.[25] On the other hand, a vessel owned by the government, but chartered to a private individual and used for carrying private cargo, was held to be immune from libel.[26] In a somewhat similar case the court proceeded on a bond given to release an attachment of a vessel privately owned and privately chartered, but declared to be in government service, and in fact engaged in carrying grain to be distributed by the government. The court intimated, however, that if bond had not been given the libel would have been dismissed.[27] In what may perhaps be regarded as the leading case, government property, carried on a private common carrier for hire, was in a proceeding *in rem* held liable to pay salvage,[28] and this doctrine was pressed so far

[21] The Siren (1868) 7 Wall. 152, 19 L. Ed. 129.

[22] The Nassau (1867) 4 Wall. 634, 18 L. Ed. 413. Cf. In re White Star Towing Co. (So. Dist. Ga., 1898) 91 Fed. 285.

[23] The Louisiana (1865) 3 Wall. 164, 18 L. Ed. 85; The Ticonderoga (High Ct. Adm., 1857) Swab. 215.

[24] The Othello (E. Dist. N. Y., 1866) 5 Blatchf. 342, Fed. Cas. No. 10,611.

[25] The Attualita, supra, n. 3, upon which see note, 16 Columbia Law Review 672; The Messicano (Prob. Div., 1916) 32 T. L. R. 319; The Broadmayne L. R. (1916) Prob. Div. 64. A Swedish vessel, requisitioned by the United States and then chartered by its owners to the United States Shipping Board Emergency Fleet Corporation and used by the Army Transport Service was held immune from arrest. The Crimdon, supra, n. 3.

[26] The Maipo, supra, n. 2. Cf. The Dora and The Annette (Prob. Div., 1919) 35 T. L. R. 288, libel *in rem* allowed as to vessel requisitioned by unrecognized government, and The Gagara (C. A., 1919) 35 T. L. R. 259, not allowed as to a prize captured from the Bolshevists by the Esthonian Government, "provisionally recognized."

[27] The Luigi (E. Dist. Pa., 1916) 230 Fed. 493.

[28] The Davis, (1869) 10 Wall. 15, 19 L. Ed. 875; The Merchant, supra, n. 20; The Othello, supra, n. 24, holding cargo of the United States not liable on a bottomry bond placed upon it by the master of a private vessel carrying it.

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that such property was held even though it was munitions for use of the armies of a country at war.[29] And Justice Story laid down that a private owner of a vessel might hold property of the government, subject to a general average contribution, against the United States.[30]

It would be profitless to endeavor to reconcile the foregoing cases. Some were cases where property of an allied government at war on the side of the country of the court was involved, and some were cases of foreign, and some cases of domestic ships. It is impossible to generalize upon all these cases in such a way as to formulate guiding principles, apt to settle the many questions likely to arise. As has been stated the only matter that is perfectly clear is that a public armed vessel in the possession and control of the government owning it, cannot be libeled either at home or abroad, and that probably the same rule applies to other vessels in government service, such as light ships and the like, but in the case of vessels used in the merchant service, the law is conflicting, with a strong tendency, however, in the most recent cases, to hold them immune.

Why is there this confusion? Is it not perhaps partly due to the nature of the theories that have been advanced by the courts to justify their decisions in holding for or against the lien?

III.

Against such existence or enforcement it has been said: (1) that to admit a lien would be a derogation of the dignity and independence of the sovereign;[31] (2) that the lien is merged in the right *in personam*, and that since no right *in personam* is possible against the State, therefore no lien exists to be enforced;[32] (3) that no process can issue against government property;[33] (4) that to permit the marshal to seize property of the govern-

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[29] The Johnson Lighterage Co. No. 24, supra, n. 5.

[30] United States v. Wilder (Circ., Dist. Mass. 1838) 3 Sumn. 308, Fed. Cas. No. 16,694. Cf. Clarke v. New Jersey Steam Navigation Co. (Circ., Dist. R. I., 1841) 1 Story 531, 542, Fed. Cas. No. 2859, *dictum*.

[31] Austin, Province of Jurisprudence Determined, Lecture VI; 1 Bl. Comm. c. 7. See The Pizarro v. Matthias, supra, n. 7.

[32] The Fidelity (Circ. Ct., So. Dist. N. Y., 1879) 16 Blatchf. 569, 573, Fed. Cas. no. 4758.

[33] United States v. Clarke (1834) 8 Pet. 436, 8 L. Ed. 1001; Stanley v. Schwalby (1892) 147 U. S. 508, 512, 37 L. Ed. 259, 261, 13 Sup. Ct. Rep. 418, Cf. Carr v. United States (1878) 98 U. S. 438, 25 L. Ed. 209. Cf. Young v. S. S. Scotia, supra, n. 20.

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ment would result in unseemly conflicts;[34] (5) that the court could not pass a valid title; (6) that since a lien implies a right to seize and hold, the allowance of a lien would admit a right to seize and hold government property, thereby diverting it from the public use to which it is devoted;[35] and (7) that the lien is an anachronism and the government can be trusted to do the right thing.[36] All these theories, if literally carried out, would result in no lien in any case. It has appeared, however, that in some cases a lien has been allowed, on reasoning that limits the fourth and sixth of the theories stated above to some circumstances, and admits the existence of the lien in others. The fourth theory, denying the courts power to enforce the lien because of the likelihood of unseemly conflicts, has been limited to cases where the property in question is in the actual possession of the government;[37] and the seventh theory, based on the impolicy of permitting property to be withdrawn by seizure from public use, has been declared to exclude uses that were merely commercial.[38] It is obvious that the admission of any such limitations is largely a repudiation of the other five theories above stated. Certain matters should be borne in mind in considering the vital force of all these theories in their application to actual conditions, and to a certain extent they contradict each other.[39]

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[34] The Davis, supra, n. 28; United States v. Wickersham (Circ. Ct., W. Dist. Tenn., 1882) 10 Fed. 510.

[35] United States v. Morgan (Circ. Ct. App., 4th Circ., 1900) 99 Fed. 570, 39 C. C. A. 374; The Roseric, supra, n. 5; The John McCraken, supra, n. 15; The Protector, supra, n. 16; The F. C. Latrobe, supra, n. 17; The Thomas A. Scott, supra, n. 11; The Seneca, supra, n. 16; The Fidelity, supra, n. 14; United States v. Cornell Steamboat Co. (1906) 202 U. S. 184, 50 L. Ed. 987, 26 Sup. Ct. Rep. 648, *semble*.

[36] The Maipo, supra, n. 2.

[37] The Davis, supra, n. 28; Long v. The Tampico, supra, n. 12; The Florence H., supra, n. 5.

[38] The Charkieh (1873) L. R. 4 Ad. & Ec. 59; Guthrie v. City of Philadelphia, supra, n. 17; The F. C. Latrobe, supra, n. 17, *dictum;* The Protector, supra, n. 16, *dictum;* City of Philadelphia v. Gavagnin, supra, n. 17; The John McCraken, supra, n. 15; In re White Star Towing Co., supra, n. 22, *dictum*. See Laski, The Responsibility of the State in England, 32 Harvard Law Review, 447, 468. But this theory was disapproved in The Maipo, supra, n. 2, the case of a foreign owned vessel under a naval captain, and in The Florence H., supra, n. 5, *dictum*. The distinction here stated bears a resemblance to that between the demesnal and patrimonial property of a state in Continental legal systems.

[39] Cf. Workman v. New York City, etc. (1900) 179 U. S. 552, 570, 45 L. Ed. 314, 324, 21 Sup. Ct. Rep. 212, 219, where Mr. Justice White says: ". . . . in the maritime law, the public nature of the service upon which a vessel is engaged at the time of her commission of a maritime

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(1) How far is there real, as distinguished from verbal, force in the argument that to admit a lien is a derogation of the dignity and independence of the sovereign?[40] So far as the dignity of the sovereign is concerned, this is the same problem as that presented when the State is named defendant in the ordinary action *in personam*, though perhaps from the point of view of the administration there is greater indignity in coming into court to claim property in the possession of the judiciary, than merely to appear to fight against a judgment which it need not pay. But the courts are just as much servants of the people as the administration, and is not their dignity quite as important? It is certainly an indignity to them to be compelled to slam their doors in the faces of those who are injured. The State should not be a despot with a touchy dignity to uphold. The extreme view is expressed in the language of Mr. Justice Holmes in the case of Kawananakoa v. Polyblank,[41] where he says, "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. *'Car on peut bien recevoir loy d'autruy, mais il est impossible par nature de se donner loy.'* Bodin Republique, 1, chap. 8, ed. 1629, p. 132; Sir John Eliot, de Jure Maiestatis, c. 3. *Nemo suo statuto ligatur necessitative. Baldus, De Leg. et Const. Digna Vox,* (2 ed. 1496, fol. 5 lb, ed. 1539, fol. 61.)." While no lien was here claimed, the principle has actuated the courts in cases involving the right *in rem* against property of the sovereign.[42] But the government has power to do the fair thing to those it injures and has in fact done so. Does anyone believe it to be any derogation of the dignity and independence of the United States that just claims are enforced

tort affords no immunity from liability in a court of admiralty where the court has jurisdiction", with United States v. Cornell Steamboat Co (1906) 202 U. S. 184, 190, 50 L. Ed. 987, 990, 26 Sup. Ct. Rep. 648, 649, where Mr. Justice Brown says: ". . . . both in England and in this country, vessels belonging to the United States or to a foreign sovereign, and engaged in public service, are exempt from seizure."

[40] See on this subject Laski, The Responsibility of the State in England, 32 Harvard Law Review, 447, and United States v. Lee (1882) 106 U. S. 196, 206, 27 L. Ed. 171, 176, 1 Sup. Ct. Rep. 240, 248. Cf. Walker v. United States (Circ. Ct., M. D. Ala., 1905) 139 Fed. 409, 413, and the dissenting opinion of Mr. Justice Harlan in Belknap v. Schild (1896) 161 U. S. 10, 28, 40 L. Ed. 599, 605, 16 Sup. Ct. Rep. 443, 449.

[41] (1907) 205 U. S. 349, 51 L. Ed. 834, 27 Sup. Ct. Rep. 526.

[42] Cf. Young v. S. S. Scotia, supra, n. 20; Long v. The Tampico, supra, n. 12.

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against it under the Tucker Act?[43] The very existence of the Act in question and the large number of suits that have been settled under it, have not resulted in the United States becoming any less dignified or independent in the eyes of its citizens or of the world. Furthermore, in foreign countries the sovereign is often accountable in the courts,[44] or in other words and to avoid the lurid language which is frequently employed to express this theory, citizens of the State have rights when they are injured through the operation of the machinery of their government. No one thinks of these countries as undignified. Nor does the dignity of the crown of England suffer because jurisdiction to enforce claims to salvage against,[45] or a general average contribution from,[46] property of the Crown has been given by consent.[47]

But the best criticism to this theory is to be found in the decisions of the courts. The lien has been regarded as existing, though sometimes unenforceable.[48] The exponents of admiralty law have not felt the same obligation towards various sovereigns as those of the common law in its later developments, and have admitted the right and sometimes the remedy. The language of Mr. Justice Miller, in a salvage case of government property, is worthy of quotation: "We are quite satisfied . . . . that it should be held to bear its share of the burden which the unani-

[43] Act of March 3, 1887, c. 359, 24 U. S. Stats. at L. 505. Also, infra, n. 73.

[44] E. g. France; Frederick P. Walton, The French Administrative Courts and the French Law as to the Responsibility of the State for the Faults of its Officials: A Comparison with the Common Law, 13 Illinois Law Review, 63. Cf. Italy; *Codice di Commercio* (1882) Art. 7; Errera, *Traité de Droit Public Belge*, p. 287, § 194.

[45] The Lord Nelson (High Ct. Adm., 1809) Edw. Adm. 79; The Marquis of Huntly (High Ct. Adm., 1835) 3 Hagg. Adm. 246. Cf. Pyman S. S. Co. v. Lords Commissioners of the Admiralty [1918] 1 K. B. 480, affirmed (A. C., 1918) 88 L. J. K. B. 277.

[46] Cf. Brown v. Stapylton (C. P. 1827) 4 Bing. 119, 130 Eng. Rep. R. 713.

[47] It has been stated that there is in the United States no officer who can give jurisdiction by consent, The Davis, supra, n. 28; United States v. Lee, supra, n. 40; United States v. New York and Oriental S. S. Co., 216 Fed. 61, 67, 132 C. C. A. 305. But cf. The Siren, supra, n. 21, and see that case for the English practise of consent giving. And see The Protector, supra, n. 16, with reference to consent by a municipal corporation.

[48] The Davis, supra, n. 28; Long v. The Tampico, supra, n. 12; The Siren, supra, n. 21, *dictum*. Cf. The St. Jago de Cuba (1824) 9 Wheat. 409, 6 L. Ed. 122; Briggs v. The Lightboats, supra, n. 19; Workman v. New York City, Mayor, Aldermen, and Commonality, supra, n. 39; The John McCraken, supra, n. 15; The Protector, supra, n. 16; The F. C. Latrobe, supra, n. 17; The Avon (Circ. Ct., No. Dist. Ohio, 1873) Brown

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mous voice of maritime nations imposes on all other property in like condition."[49] Has not every case where the lien was enforced as in the case from which this quotation comes, and every case where it was not enforced but was declared to exist, rendered the theory ridiculous? Is there not greater indignity to the State in being declared a debtor as to its property, even though it cannot be compelled to pay, than in being declared no debtor at all?

In referring to this theory in connection with the maritime lien, however, it should be noticed that the propounders of State immunity speak not alone of the sovereign's dignity but of its independence as well. If by "independence" is meant an equivalent of dignity, a freedom from the trouble and vexation of litigation, then all that has been said in criticism here and elsewhere seems justified. But if by "independence" is meant freedom of the administration to perform public service a different question is presented, which will be discussed later. Very likely in many cases this last idea was in the judicial mind, but draped in language appropriate to the divine right of kings.

(2) It has been stated that the lien is merged in the right *in personam*, and since no right *in personam* exists against the state, therefore, no lien exists to be enforced.[50] Assuming that there is no right *in personam* against the state, it does not necessarily follow that there can be no lien. In addition to what has already been said,[51] it is to be remembered that a lien may exist independently of a right *in personam* in certain cases of salvage,[52] that it has been held that even though there is no fault on the part of the owner of the vessel, the vessel may still be sued.[53] Indeed, the existence of a lien and the enforcement of a right *in personam* are independent matters, and there is nothing so peculiar to a case where a state is the owner of the property in question as to result in a merger in this case and not in another.

Adm. 170, Fed. Cas. No. 680, *semble*. Cf. United States v. Lee, supra, n. 40. Cf. United States v. Cornell Steamboat Co., supra, n. 39; The Florence H., supra, n. 5, *dictum*.

[49] The Davis, supra, n. 28.

[50] The Fidelity, supra, n. 14.

[51] Supra, n. 48.

[52] The Emblem (Dist. Me., 1840) 2 Ware 68, Fed. Cas. No. 4434, *dictum*.

[53] The China (1868) 7 Wall 53, 19 L. Ed. 67.

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(3) In cases of non-maritime nature, it has been often stated that no process can issue against government property.[54] The answer to this argument is the simple one, that in maritime cases process has in fact been issued against such property.

(4) It is also said that to permit the marshal to seize property of the government would result in unseemly conflicts between two branches of the government,[55] but, as has already been noticed,[56] this statement has also been modified so as to apply only to cases where government property is in the actual possession of the government. There is no greater likelihood of an unseemly conflict in cases where the property is in the hands of the government than in the many cases where the courts have issued to officials writs of mandamus, habeas corpus and the like, and in those where they have declared invalid a revenue or similar law. The officials concerned could with just as much show of right object to the decision of the court, as could government officials or employees, or men under contractual obligation to the government, raise objections when ordered by other government officials to deliver up property in their possession. Once the power of the marshal to seize were declared, the fear of conflict would prove evanescent, for non-resistance is largely a matter of habit and not of principle. If the Supreme Court once declared that a marshal could take property from any person, even a government official, government officials would as readily acquiesce in this decision as they do now, when served with writs of habeas corpus and mandamus.

As has been stated there is a modification of this theory, undoubtedly the result of a compromise between a desire to protect the creditor and a reverence for the theory of sovereign dignity, with also a fear that certain high officials of the government would be more likely to resent interference by a marshal than would lesser employees of the government an private individuals. The leading case is the Davis,[57] where Justice Miller, following Briggs vs. The Light-

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[54] Supra, n. 33.

[55] The Davis, supra, n. 28. Cf. United States v. Morgan (Circ. Ct. App., 4th Circ., 1900) 99 Fed. 570.

[56] Supra, n. 35.

[57] Supra, n. 28, but according to the reasoning of the Court in another case, apparently if the marshal obtains possession the shoe is on the other foot, The Willamette Valley (Dist., No. Dist. Cal., 1894) 62 Fed. 293, 305, citing The Davis, supra, n. 28, as authority. This suggests the possibility of a race for possession between the two branches

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boats,[58] said, "The doctrine is laid down and well supported, that proceedings in rem to enforce a lien against the property of the United States are only forbidden in cases where in order to sustain the proceeding the possession of the United States must be invaded under process of the court." But when is property in the possession of the United States, and when not? In this case the property of the United States was in the possession of the civilian captain of a privately owned merchantman, who agreed to carry for hire. Again in Long vs. The Tampico,[59] the court decided that the possession of a captain employed to navigate a boat from one port to the other was not the possession of the sovereign. But in the Maipo[60] the court held that the possession of a captain was the possession of the government. In the first two cases the captain was a private individual, but in the third, had a commission from the Chilean Navy. Was it the captain's gold lace that resulted in a different decision? It was not in his power to bring into opposition to the marshal the forces of his own government, for he was apparently the only naval officer on the ship, which was in the harbor of a foreign state. It has been suggested, however, that property is in the possession of the government when it is in the possession of one of its officers.[61] This explanation of the rule makes its practical application no easier. Who is an officer of the government? Is he one declared to be so, or paid in a certain way, or receiving a certain salary, or employed continuously? It seems absurd to deprive a man of a remedy because of the peculiarities of the government's internal organization.

The fear of conflicts between two branches of the government is not a true test. While doubtless there are some officers of the government who would resent interference by a marshal more than others, and there is greater likelihood of the equivalent of a breach of the peace occurring, in the last analysis this is a personal question of the individual and not of his position.

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of the government, which would seem quite as undesirable as any attempt by one official to take property from another.

[58] Supra, n. 19.

[59] Supra, n. 12.

[60] Supra, n. 2.

[61] Long v. The Tampico, supra, n. 12. See The Florence H., supra, n. 5. The unreality of the doctrine is shown by a decision that the possession of officers of the United States revenue marine to complete the contract of a defaulting contractor was not that of the United States but of the contractor, and therefore a libel of a revenue cutter was allowed, The Revenue Cutter No. 2, supra, n. 13.

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Should the rights of the injured person and of the public at large depend on so slight a consideration as the rank of a man doing government work? It does not matter to one whose ship is run down on the one hand, or to the public waiting for the carriage of its goods and the expansion of its trade, on the other, whether the vessel doing the damage is navigated by a rear admiral or by a civilian hired for the job.[62] While this doctrine has never been repudiated in so many words, the reasoning in a recent case is all against it.[63]

In any event this theory is inconsistent with the others. It leaves out of consideration immunities based on impeccable dignity, that is,—on the sovereign's right to be unfair. It denies the totality of immunity on such grounds by finding it necessary to bring forward another reason. It presupposes liability and dodges the issue of enforcement out of fear of trouble.

(5) Again, it has been argued that an admiralty court could not pass a valid title to government property. This question seems never to have been discussed. Perhaps in those cases where the lien was allowed the government paid before a sale took place. If the objection is based on fear that officers of the State will endeavor to recapture the property, we have again the question of unseemly conflicts; if on the fact that there is no statute authorizing alienation of government property by this method, the answer would seem to be that the admiralty court has power to pass a title to property by reason of the lien upon it,[64] and that the existence of this power is one of the incidents of the existence of that lien. When a court says there is a lien, it means this power exists, and we are back at the proposition of this article.

(6) Numerous cases, however, do not adopt any of the foregoing theories, but in denying the enforceability, or less often the existence, of a lien, proceed mainly upon the ground that government-owned property, when devoted to the public service, should not be diverted from that service.[65] The most recent

[62] As in Long v. The Tampico, supra, n. 12.
[63] The Roseric, supra, n. 5.
[64] E. g. The Trenton, (Dist., E. Dist. Mich., 1880) 4 Fed. 657.
[65] The Roseric, supra, n. 5; The F. C. Latrobe, supra, n. 17; The Protector, supra, n. 16; Workman v. New York City, Mayor, Aldermen, and Commonality (1900) 179 U. S. 552, 570, 45 L. Ed. 314, 324, 21 Sup. Ct. Rep. 212, 219; United States v. Morgan, supra, n. 55; The Fidelity, supra, n. 14; The Seneca, supra, n. 16. See 17 Harvard Law Review, 270. Cf. the French law: *"A raison de leur utilité, certains navires bien qu'appartenant à des armateurs ne peuvent être saisis. Ce*

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decisions lay particular stress upon such reasoning as this. Here we are on firm ground, and this contention has great force in war-time, not only in the case of a public armed ship, but in that of a government merchant vessel, serving a military purpose, or carrying supplies for a civil population, provisioned not by private effort but by that of the State.[66]

However, as has already been stated, there has been recognized a limitation upon this doctrine in cases where government ships are engaged in ordinary commercial trade. In England this limitation seems to have been finally overthrown.[67] With us, however, there are still numerous unrepudiated suggestions of its compelling force,[68] bearing the impress of the familiar distinction between the public and commercial functions of a municipal corporation; and certainly the impulse that prompts it in connection with vessels strictly government-owned or operated has also manifested itself in those decisions holding that a vessel operated by a receiver is subject to a lien.[69] It is upon this limitation, rather than upon that obtaining as to property not in the actual possession of the government, that the strongest arguments of the proponents of the lien upon our new government owned and civilly operated merchant vessels can be based. It is an argument not without force in the case of domestic vessels, whatever view might be taken as to foreign merchant vessels because of a desire to show international courtesy. Of course, from the point of view of the prospective libelant, the fact that the vessel is on the one hand owned by the state and operated by it, operated by a private person under charter or other arrangement with it, owned by a private person and operated by the government under charter or otherwise, or on the other hand, is owned and operated privately, makes little difference, for he will meet this vessel, not as one meets naval vessels, but in the ordinary commercial channels and will be called upon

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sont les navires affectés à un service postal. La saisie empêcherait l'exécution d'un service, et, sauf une exception légale formelle [au cas de contravention douanière] elle est impossible". Edmond Thaller, *Traité, etc., de Droit Commercial (Droit Maritime par* Georges Ripert), Paris, 1913, p. 713, § 892.

[66] The Roseric, supra, n. 5.

[67] The Parlement Belge, supra, n. 7.

[68] Supra, n. 38.

[69] E. g. The Willamette Valley, supra, n. 57. Cf. also North American Commercial Co. v. United States (Circ. Ct. App., 9th Circ., 1897) 26 C. C. A. 591, 81 Fed. 748, and cases cited, holding liens enforceable on vessels seized for violation of the navigation laws.

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to deal with it intimately, however owned or operated. This prospective libelant deserves consideration. He must not be disregarded in idealistic and sentimental dreams of government ownership. He is directly and vitally concerned, far more so than the great mass of the people of this nation, so many of whom live inland, preferring as to maritime matters not directly touching their pockets the self indulgence of visions to practical fairness to the shipping world on the coasts, whose welfare is directly involved. But, on the contrary, protection to the rights of the prospective libelant are by no means the sole desideratum.. A new factor has appeared, which tips the scale the other way,—that is, against the enforcement of the lien. Formerly government-owned merchant vessels were an exception, operated for a particular purpose or on isolated runs, and not in pursuance of a programme national in its scope. There are intimations that our new merchant marine may be operated to carry out a national policy.[70] If so, the amenability of its vessels to seizure here and there will work a serious interruption to the carrying out of a scheme adopted for the benefit of the nation as a whole. It may well be—time only will tell—that the validity and justice of the limitation under discussion will no longer exist in the light of actual conditions.

(7) To return to the last of the seven theories above mentioned: that the lien is an anachronism, and the government can be trusted to do the right thing, Judge Mayer has apparently this faith: "It is not to be presumed, however, that any friendly government, or our own government, will fail to do what is just and fair in connection with operations of a commercial character."[71] Thiers is reported to have said "L'État est solvable et honnête homme".[72] What has our own State done? There is the Tucker Act,[73] requiring attendance at Washington for claims over $10,000, and there is the limited jurisdiction of the Court of Claims, of which it has been said, paraphrasing a poem of Andrew Marvell:

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[70] The Nautical Gazette, Jan. 4, 1919, p. 2, Jan. 18, 1919, p. 46, Feb. 15, 1919, p. 115, and supra, n. 1.

[71] The Maipo, supra, n. 2.

[72] Jèze, *Eléments de Droit Public et Administratif*, p. 252.

[73] Act of March 3. 1887, c. 359, 24 U. S. Stats. at L. 505, in large part incorporated in the Judicial Code (Act of March 3, 1911, c. 231, 36 U. S. Stats, at L. 1087). See § 24, par. 20, and § 145.

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"Had we but world enough and time
This slow procedure were no crime.
We would sit down and think which way
Were best to argue day by day.
Thou by the Indian Ganges' side
Shouldst witness find: I by the tide
Of Humber do the same. I would
Plead with you years before the Flood,
And you should, if you please, refuse
Till the conversion of the Jews.
But at my back I always hear
Time's winged chariots hurrying near;
And yonder all before us lie
Deserts of vast eternity."

With reference to a certain number of cases there is that clause of the Shipping Act,[74] providing: "Such vessels [every vessel purchased, chartered or leased from the United States Shipping Board] while employed solely as merchant vessels shall be subject to all laws, regulations and liabilities of government merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein." But this would seem to exclude vessels operated *by* or chartered *by* the United States Shipping Board. Nor is it clear that the liability to which these vessels are subject is that of privately owned as distinguished from government-owned merchant vessels, nor that the lien is a liability contemplated, nor that if contemplated, is enforceable, nor that the laws, regulations, and liabilities contemplated are merely those of the Navigation Laws relating to registry, inspection, manning and the like, and not to liability to private persons for damage, nor that the rights, if any, given private persons are enforceable elsewhere than in the Court of Claims. In any event questions arising under the Charter Act[75] as to government-owned merchant vessels must go to the Court of Claims.

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[74] Act of September 7, 1916, c. 451, § 9, 39 U. S. Stats. at L. 728, 730. Upon the whole act see note, 17 Columbia Law Review, 357, and Henry Hall, Regulation of Water Carriers, 66 University of Pennsylvania Law Review, 95.

[75] Act of July 18, 1918, c. 157. See § 14.

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To those on the Pacific Coast a trip to Washington and the Court of Claims with regard to a case involving, let us say, not over $12,000, is the equivalent of losing it.

Is the lien an anachronism? It is true that it has been traced to an obsolete relic—the law of deodands and the *noxae deditio*—by a learned author now a Justice of the Supreme Court,[76] though this theory has been combatted.[77] But however that may be, and however adverse the current of decision, do not arguments for the existence of a lien or its equivalent obtain today with almost as much force as they ever did? It is true that the owner is more easily reached today than he used to be, and perhaps the reason for the lien based on the difficulty of finding him, contrasted to the ease of catching his ship, has less force. But if he is the government, he is like the great Bogy in Peer Gynt.[78] On the other hand there is today a greater need for quick decision than formerly, and if there is no lien on merchant vessels governmentally-owned, such quick decision will be seriously interfered with if it be necessary for the prospective libelant to consider in every case whether the innocent-seeming ship he deals with belongs to and is operated by a private individual against whom he has remedies, or is for some reason, possibly obscure, immune.

IV.

What is the remedy for this situation? It depends on the course the government adopts with regard to its many merchant ships, but we may safely assume that a large number will remain owned by the government at least for some time to come.

It is well known that the states of the Australian Commonwealth have for a great number of years conducted enterprises which in other communities have been left to private initiative, and the action of the Parliaments of New South Wales and Queensland, is very significant. Under acts passed there[79] very full pro-

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[76] Holmes, The Common Law, p. 25 and ff.

[77] 1 Halsbury, Laws of England, p. 61 note, citing Marsden on Collisions (5th ed.) p. 72; 1 Select Pleas in Admiralty, 6 Selden Society Publications lxxii.

[78] Act II, Scene 7.

[79] Claims against the Government and Crown Suits Act, (1912) 9 Statutes of New South Wales No. 27, § 11, incorporating Claims against Colonial Government Act of 1876. See Quick and Garran, The Annotated Constitution of the Australian Commonwealth, p. 805, § 338, for a statement of remedies against the crown in the Australian Common-

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vision is made for the enforcement of rights against the Crown. Not only can payment of money damages be secured, but specific performance, restitution of rights and recovery of lands and chattels; and, if payment of a money decree against the crown is not made within sixty days after demand, execution may be had for the amount due and may be levied upon any property vested in the state government, though not upon property of the imperial government. The Act of New South Wales came up for consideration in the case of Bowman v. Farnell[80] and the motives leading to its passage were thus stated by Judge Faucett: ". . . . when we consider the great variety of transactions which the Colonial government undertakes and carries on, the old maxim [The King can do no wrong] seems in a large degree unapplicable to the state of things existing here and we must presume that the Legislature, having this state of things in view, altered the law to meet the altered circumstances." Nor, apparently, is this process of allowing seizure of property of the state unknown elsewhere.[81] So far as our merchant marine is concerned, it is quite possible that we are embarking upon the same policy of government ownership that formerly obtained in the Australian Commonwealth, and led to the statutes that I have mentioned. But so far as maritime matters are concerned the remedy of an execution after demand would be without the great advantage of maritime lien. By the time the government had pondered and decided, either the vessel would be gone or possibly the public seriously handicapped by her waiting; and also, if the seizure allowed were merely an attachment, the

wealth. See also Claims against the Government Act, (1911) 29 Vict. No. 23, 1 Queensland Statutes 546, § 8, similar in terms to the New South Wales Act, and providing for execution by distress and sale upon any property vested in Her Majesty, except real and personal property used for the land or sea forces or for imperial purposes, or used or intended to be used by the governor, buildings for Parliament of Brisbane, court houses and jails, and property appertaining to them.

[80] (Sup. Ct. of New South Wales, 1886) 7 N. S. W. L. R. 1, 13, appealed to the Privy Council, where Sir Barnes Peacock spoke to the same effect, Farnell v. Bowman [L. R.] 12 A. C. 643, (1887).

[81] Possibly in Italy: by the *Codice de Commercio* (1882) Art. 7 "the State, the Provinces, and the Communes cannot acquire the status of commercial persons, (*la qualità di commercianti*), but they can do acts of commerce and for the purposes of these remain subject to the commercial laws and usages." *Codice Civile* (1865) Arts. 425 to 428, relating to property belonging to the State, the Provinces, the Communes, or private individuals, divides the State's property into the public demesne and patrimonial property, and Italian government merchant vessels would seem to be the latter. In the Code of Civil Procedure, Arts. 585 to 586, listing property exempt from attachment, no mention is made of property

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remedy by sale would be lost, for only the interest of the wrongdoer would pass and not a good title against the world.[82]

An administrative court of the sort popular in many connections might be established.[83] This would have the advantage of making those who are experts in the carrying out of government policies decide questions they are familiar with. But an objection to this procedure is ably stated by Mr. Laski,—the tendencies of such courts to become bureaucratic and arbitrary.[84] Conceding, however, the suitability of such a court for deciding questions of rates, ownership and possibly charters, such a court is not needed, might be unfit, and would be overburdened in connection with the great bulk of cases that will arise, concerning wage claims and expenses of care and cure and return of seamen, cargo damage, repairs, supplies, towage, collision, salvage and general average. The District Courts have had long experience in these matters and should continue to decide them.

It is submitted that what is needed is a statute of Congress clearly recognizing liability of government owned or chartered vessels in all these matters to as full an extent as there is liability in the case of merchant vessels privately owned and operated, and jurisdiction to enforce this liability in the District

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of the State. The desmesnal property is inalienable under Art. 430 of *Codice Civile*, but the patrimonial may be alienated in conformity with the laws relating thereto. The Commercial Code, Arts. 674 to 682, relating to privileged claims, makes no exemption of the State's patrimonial property. It would seem that since there is no exemption of the State's patrimonial property it would be liable to attachment, but Art. 430 may be interpreted by the courts as implying an exemption. Only the *Giurisprudenza Italiana* would show, and it is not available.

Austria: statute promulgating the Law of Executions (1896) says in Art. 8: "in particular there remain unimpaired . . . . (5) the rules of court decree of May 16, 1793, Collection of Judicial Law, No. 103, limiting the placing of interlocutory orders and judicial execution upon ships intended for the transportation of government property in time of war and upon the apparel belonging thereto . . . ." Government ships were probably here included because this citation is one of an inclusive group referring to property including government property which could not be seized. Therefore there is probably government property which could be seized, and arguably government merchant ships carrying war supplies, if any.

Cf. Belgium: garnishee process is permitted against the state, though not a direct seizure of its property, and seizure is permitted of the king's goods if not a suit *in personam* against him, Errera, *Traité de Droit Public Belge*, p. 266, § 179, p. 287, § 194, p. 192, § 127.

[82] Supra, n. 64.

[83] Cf. Interstate Commerce Commission, and various state railroad commissions, etc.

[84] Laski, The Responsibility of the State in England, 32 Harvard Law Review, 447, 462.

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Courts, with an adequate provision for speedily satisfying such decrees as may be rendered. As to the lien, it is quite feasible that the libelant obtain practically the equivalent without holding up the ship. Let Congress provide for the issuance by the Shipping Board of what might be called certificates of immunity. All merchant vessels not carrying these certificates could be proceeded against in the ordinary course. When vessels carrying these certificates were libeled, release of the vessel should be immediately ordered on presentation of the certificate in proper form to the court from which the libel issued, and—most important of all—this process of presentation should be given the same effect as if a stipulation had been filed by the United States to answer to the decree of the court.[85] It is submitted that this would solve the difficulty as to our own ships in our own courts, but merchant vessels of foreign governments will continue to come to our ports and our own government merchantment will go abroad. By universal treaty provision should be made for extending the practice above outlined to all civilized maritime nations.

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[85] See The Crimdon, supra, n. 3.

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Comment on Recent Cases

BILLS AND NOTES: NEGOTIABILITY UNDER UNIFORM NEGOTIABLE INSTRUMENTS LAW.—The Supreme Court of California has recently decided in the case of *Utah State National Bank v. Smith*[1] that, under the Negotiable Instruments Law as enacted in Utah, a provision in a note for the acceleration of maturity at the option of the holder on the non-payment of interest did not render the note non-negotiable. The objection made to the negotiability of the note was based on section 1156[2] of the Compiled Laws of Utah to the effect that a negotiable instrument must be payable at a determinable future time and that a note whose time of payment depended upon the option of the payee did not comply with this requirement. In overruling this contention the court followed the general rule established by the law merchant[3]

[1] (Feb. 24, 1919) 57 Cal. Dec. 234.
[2] Corresponding to Cal. Civ. Code § 3085 enacted in 1917.
[3] Chicago Railway Equipment Co. v. Merchants' National Bank (1890) 136 U. S. 268, 34 L. Ed. 349, 10 Sup. Ct. Rep. 999; cases cited in 35 L. R. A. (N. S.) 391 n; 8 C. J. 139.

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and adopted in the states where the Negotiable Instruments Law has been enacted.[4] It refused to consider earlier California decisions[5] upon this point remarking: "The decisions of the courts of this state, based upon its various code provisions concerning negotiable instruments and particularly upon sections 3088 and 3093, Civil Code, since repealed and replaced by the uniform negotiable act, obviously can be of no assistance in ascertaining the law of Utah under the uniform act.

"The history of its drafting and enactment in the various states makes it clear that the purpose was to secure uniformity of legislation and decision throughout the United States, and the purpose is further manifest by a general proviso with reference to the applicability of the general law merchant to supplement the legislation, and no doubt to aid in its interpretation."

The decision is of interest in California although it interprets the law of Utah for the reason that the language quoted above may be taken as a forecast of the policy of the Supreme Court with reference to the law of negotiable instruments in the future.

The Negotiable Instruments Act does not contain the provision on uniformity of interpretation as do the other uniform acts.[6] The Act as adopted in California also omitted the section repealing inconsistent legislation.[7] These provisions were inserted in the Warehouse Receipts Act[8] adopted in 1909 and in the bills now pending before the legislature; viz. the Uniform Sales Act,[9] the Uniform Partnership Act,[10] and the Uniform Bills of Lading Act.[11] A desire for uniformity on the part of the authors of this legislation is thus clearly shown.

It is to be hoped that the Supreme Court will follow the generally accepted liberal construction of the act[12] as enunciated by Mr. Justice Wilbur and disregard its former decisions based on

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[4] First National Bank v. Barrett (1916) 52 Mont. 359, 157 Pac. 951; Bright v. Offield (1914) 81 Wash. 442, 143 Pac. 159; Mackintosh v. Gibbs (1909) 79 N. J. L. 40, 74 Atl. 708.

[5] National Hardware Co. v. Sherwood (1913) 165 Cal. 1, 130 Pac. 881; Meyer v. Weber (1901) 133 Cal. 681, 65 Pac. 1110; Smiley v. Watson (1913) 23 Cal. App. 409, 138 Pac. 367.

[6] The title of the California act, however, reads "An act to repeal title 15 . . . . and to add a new title 15 . . . . and to make the law of Negotiable Instruments in the State of California uniform with the laws of other states."

[7] § 197 of the Uniform Negotiable Instruments Act.

[8] Cal. Stats. 1909, ch. 290, § 57.

[9] Senate Bill No. 134, §§ 1801c, 1801f.

[10] Senate Bill No. 132, §§ 2398, subd. 4, 2438.

[11] Senate Bill No. 133, §§ 2132a, 2132d.

[12] Union Trust Co. v. McGinty (1912) 212 Mass. 205, 98 N. E. 679; Richards v. Market Exchange Bank Co. (1910) 81 Ohio St. 348, 90 N. E. 1000, 26 L. R. A. (N. S.) 99; Cherokee National Bank v. Union Trust Co. (1912) 33 Okl. 342, 125 Pac. 464. Also see Commercial National Bank v. Canal-Louisiana Bank & Trust Co. (1916) 239 U. S. 520, 60 L. Ed. 417, 36 Sup. Ct. Rep. 194, in interpreting the Warehouse Receipts Act.

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the provisions of the Civil Code.[13] The character of negotiability should be extended to mortgage notes[14] and bonds[15] and other instruments as suggested by Mr. Harrison in an article published recently in this Review.[16] This decision which marks one step towards uniformity should be the precursor of others along similar lines. *R. P.*

DAMAGES: MENTAL SUFFERING: EVIDENCE OF PLAINTIFF'S POVERTY.—The case of *Smith v. The Atchison, Topeka and Santa Fe Ry. Co.*[1] suggests an ever perplexing problem in the law of damages for personal injuries. Evidence as to the number and ages of the plaintiff's children was held not admissible for the purpose of proving mental suffering. While the cases are not in harmony as to the admissibility of such evidence, the weight of authority seems to be against it. However, the statements of the courts are often so broad as seemingly to sanction such evidence, and this viewpoint, which is supported by considerable authority, seems justly to demand careful consideration.

In recoveries for mental anguish or suffering, it is a basic rule that mental anguish must be either "direct" or, when "indirect", the proximate result of defendant's act. As a general rule, mental suffering is not of itself a cause of action; it is *damnum absque injuria.*[2] On the other hand, if it accompanies other injuries for which action traditionally lay, and is a proximate result, it is material damage.[3] The chief objection urged against the allowance of compensation for mental suffering was, once, that it was not capable of estimation in money; though that argument might equally have been urged against damages for physical pain. The law long since came to the view that mere difficulty in measuring damage to the feelings should not preclude compensation therefor in a proper case.[4]

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[13] Supra, n. 5. See criticism of previous codification in article Law Merchant and California Decisions by Professor Kidd, 2 California Law Review, 377.

[14] The existence of mortgage security does not affect negotiability in other states where the act is in force; even in states where there is a similar provision to Cal. Code Civ. Proc. § 726. 8 C. J. 200 and cases there cited.

[15] Negotiability of Bonds in California, 6 California Law Review, 444.

[16] The Adoption of the Negotiable Instruments Law in California, 6 California Law Review 23.

[1] (Jan. 28, 1919) 57 Cal. Dec. 122.

[2] 5 Columbia Law Review, 182; Sutherland, Damages, (4th ed.), p. 339.

[3] Sedgwick on Damages, p. 920; Zibbell v. So. Pac. Co. (1911) 160 Cal. 237, 116 Pac. 513; Wheelock v. Postal Tel. Cable Co. (1908) 197 Mass. 152, 83 N. E. 313; Chicago City R. Co. v. Anderson (1899) 182 Ill. 298, 55 N. E. 366.

[4] Sedgwick on Damages, p. 72; Young v. Western Union Tel. Co. (1890) 107 N. C. 370, 11 S. E. 1044; Wadsworth v. Western Union Tel. Co. (1888) 86 Tenn. 695, 711, 8 S. W. 574; Ind. Ry. Co. v. Orr (1908) 41 Ind. App. 426, 84 N. E. 32; Walker v. Chanslor (1908) 153 Cal. 118, 94 Pac. 606; Elfers v. Woolley (1889) 116 N. Y. 294, 22 N. E. 548; Lyon v. Hancock (1868) 35 Cal. 372.

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A loss immediately resulting from an act is a direct loss; one resulting mediately in an "indirect" or "consequential" loss, and this may be one step or a dozen in the line of causation from the initial act. If so near that the law concerns itself with the connection, it is a "proximate" loss; otherwise, it is a "remote" loss. When, then, shall it be said that a consequental damage is proximate and when remote? Of course, any physical injury, whether immediately or mediately caused by the defendant's act, may itself branch out into a network of physical and mental and social subresults. Now, when the initial physical result is a "direct" consequence of defendant's act, the law makes no distinction between all these ramifying sub-consequences; all are "proximate", i. e., none are disregarded by the law. But if the same initial physical injury were indirectly caused, then some of the sub-consequences are excluded, as "remote". Whether a particular indirect harm to plaintiff is a proximate result of defendant's act is a question for the jury to be determined by them from a knowledge of all the circumstances.[5]

The courts have come to recognize that peace of mind is as much a legal right as freedom from physical interference.[6] To merit recovery it is not even necessary that the suffering should have originated simultaneously with the physical injury, if it is the proximate result of this.[7] The courts are, however, divided in deciding what mental suffering is to be considered proximate. Thus, mental anguish for which recovery may be had is usually restricted to suffering arising from the injury to the person himself, as distinguished from suffering which comes from sympathy for another's suffering.[8] Again, a disabled plaintiff's anxiety about his own business has been held not to be a proper subject of recovery; but mental suffering from the consciousness that one has become incapable of earning a living has been held to be a proper ground for recovery.[9] Also, mental anxiety and distress,

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[5] Tice v. Munn (1884) 94 N. Y. 621; Lake v. Milliken (1873) 62 Me. 240, 16 Am. Rep. 456; Merrill v. Los Angeles Gas & Elec. Co. (1910) 158 Cal. 499, 111 Pac. 534.

[6] Sutherland, Damages, (4th ed.), p. 350; Larson v. Chase (1891) 47 Minn. 307, 50 N. W. 238; Sullivan v. Old Colony St. Ry. Co. (1908) 197 Mass. 512, 83 N. E. 1091; West v. Western Union Tel. Co. (1888) 39 Kans. 93, 17 Pac. 807; Fairchild v. The California Stage Co. (1859) 13 Cal. 599; Lawrence v. Housatonic R. R. Co. (1860) 29 Conn. 390; Linder v. Carpenter (1872) 62 Ill. 309.

[7] Sutherland, Damages, (4th ed.) p. 4663; Louisville & N. R. Co. v. Brown (1908) 127 Ky. 732, 106 S. W. 795, 13 L. R. A. (N. S.) 1135.

[8] Loomis v. Hollister (1902) 75 Conn. 275, 53 Atl. 579; Haupt v. Swenson (1904) 125 Ia. 694, 101 N. W. 520; Woodstock Iron Works v. Stockdale (1905) 143 Ala. 550, 39 So. 335; Linn v. Duquesne Borough (1903) 204 Pa. St. 551, 54 Atl. 341; Maynard v. Oregon R. & Nav. Co. (1904) 46 Ore. 18, 78 Pac. 983.

[9] Statler v. Geo. A. Ray Mfg. Co. (1909) 195 N. Y. 478, 88 N. E. 1063; Sedgwick on Damages, p. 66 and note.

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which, though the proximate and natural result of the injury are independent of it, are subjects of compensation.[10]

It is very plain that where a visible primary physical injury that is "direct" has led to further physical or mental derangements, the law might well regard it as impracticable to draw a line between proximate and remote within this sphere of bodily health and ailments; but practicable to draw the line between what is proximate and remote, as respects consequences lying outside the body in the sphere of social complications, as, e. g., in cases of loss of employment. The problem presented in such cases as the principal case is a nicer one: the distinction of remoteness is drawn between results confined to the plaintiff's person, and results that are wholly mental. For sympathetic suffering due to plaintiff's thought of another's suffering or inconvenience, no recovery can be had; for "physical pain" that accompanies an injury to himself, he may recover; but query whether he should recover for his own "mental suffering", other than physical pain, that accompanies a physical injury?

In the instant case, the court approves the limitations set by Steinberger v. Cal. Electric Garage Co.[11] to the general language employed in Merrill v. Los Angeles Gas & Electric Co.[12] In the latter case, the court said: "Grief, anxiety, worry, mortification and humiliation, which one suffers by reason of physical injuries are component parts of the mental suffering for which admittedly damages may be awarded. It is meaningless to say that mental suffering must be that occasioned by physical pain, for then the latter phrase would alone be sufficient to convey the full meaning of the law. When the law says a recovery may be had for mental suffering, it must include the numerous forms and phases which mental suffering may take, which will vary in every case with the nervous temperament of the individual, his ability to stand shock, his financial condition in life, whether dependent upon his own labor or not, and similar circumstances. Worry and anxiety over the future of his family would be a great element of mental suffering to a man dependent upon his own exertions for his support and their support."

Was this language and reasoning open to correction? As the opinion in the Merrill case showed the courts of this country are divided upon the question whether physical pain alone, or other mental suffering due to the injury, as well, should be recognized. The Merrill case took the more liberal view. Why is it not desirable? If this view of the subject is accepted and it seems that it well may be, should not evidence of plaintiff's poverty (which will include the size of his family) be admissible to show in-

[10] Procter v. So. Cal. Ry. Co. (1900) 130 Cal. 20, 62 Pac. 306; Merrill v. Los Angeles Gas & Elec. Co. (1910) 158 Cal. 499, 111 Pac. 534; Webb v. Yonkers R. Co. (1900) 64 N. Y. S. 491.

[11] (1917) 54 Cal. Dec. 502, 168 Pac. 570.

[12] (1910) 158 Cal. 499, 512, 513, 111 Pac. 534, 540.

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creased mental suffering? Most of the cases hold that such evidence is not admissible.[13] On the other hand where exemplary damages are claimed defendant's pecuniary ability is a matter for the consideration of the jury, on the ground that a given sum would be a much greater punishment to a man of small means than to one of larger means.[14] It has also been held in a few cases that plaintiff may show his own poverty or social condition to enhance exemplary damages.[15] If permitted in estimating exemplary damages, why not in estimating compensatory damages? Plaintiff has suffered mentally because of the injury and his poverty causes him greater mental suffering than he would otherwise have endured.

Attempts to widen the door have not been tolerated by most of the courts. However, in view of the general principles which the courts purport to follow, should they not be? In California the language of the Civil Code at sections 3282 and 3333 would seem to justify such a recovery. The legal prejudice against mental suffering as damages should not exist where the suffering is caused directly by the injury or is the natural and proximate consequence of it. Even the courts that deny recovery do not appear to be entirely satisfied with their own reasoning.[16] While damages for injury to the feelings are frequently too shadowy and speculative to be properly measured,[17] this is no reason for denying their recovery in all cases. The view urged is that these damages are compensatory, and that their amount should be left to the sound discretion of the jury.

M. H. V. G.

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[13] Green v. So. Pac. Co. (1898) 122 Cal. 563, 55 Pac. 577; Johnston v. Beadle (1907) 6 Cal. App. 251, 253, 91 Pac. 1011; Mahoney v. San Francisco etc. Ry. Co. (1895) 110 Cal. 471, 42 Pac. 968; Chicago, B. & Q. R. R. Co. v. Johnson (1882) 103 Ill. 512; Central Rd. v. Moore (1878) 61 Ga. 151; Story v. Green (1913) 164 Cal. 768, 770, 130 Pac. 870, 871.

[14] Greenberg v. Western Turf Co. (1903) 140 Cal. 357, 73 Pac. 1050; Johnson v. Lamm (1910) 156 Ill. App. 287; Singer Mfg. Co. v. Bryant (1906) 105 Va. 403, 54 S. E. 320; Barkly v. Copeland (1887) 74 Cal. 1, 7, 15 Pac. 307, 310; Brown v. Barnes (1878) 39 Mich. 211; Hayner v. Cowden (1875) 27 Ohio St. 292; Cal. Civ. Code, § 3294.

[15] Press Pub. Co. v. McDonald (1894) 63 Fed. 238; Schmitt v. Kurrus (1908) 234 Ill. 578, 85 N. E. 261; Fay v. Parker (1872) 53 N. H. 342; Wirsing v. Smith (1908) 222 Pa. 8, 70 Atl. 906; Griser v. Schoenborn (1909) 109 Minn. 297, 123 N. W. 823.

[16] Homans v. Boston Elevated Ry. Co. (1902) 18 Mass. 456, 62 N. E. 737; Braun v. Craven (1898) 175 Ill. 401, 51 N. E. 657; Spade v. Lynn B. R. Co. (1897) 168 Mass. 285, 47 N. E. 88.

[17] Mahoney v. Dankwart (1899) 108 Ia. 321, 79 N. W. 134; Wyman v. Leavitt (1880) 71 Me. 227, 36 Am. Rep. 303; Fox v. Borkey (1889) 126 Pa. St. 164, 17 Atl. 604; Bovee v. Danville (1880) 53 Vt. 183, 190; Turner v. Great Northern Ry. Co. (1896) 15 Wash. 213, 46 Pac. 243.

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EQUITY: JURISDICTION TO PREVENT A MULTIPLICITY OF SUITS.—A corporation represented to numerous persons that if each would buy a share of its stock, it would extend him credit on his purchases of goods from the corporation. The representation was made individually to each person; and each in reliance thereon gave his note in part payment for a share of stock. The corporation then refused to extend further credit. At maturity the notes were transferred for collection, and actions were begun on some of them. Assuming that each maker has a cause of action to have his note cancelled for fraud, will equity, on petition of the makers, take jurisdiction to prevent a multiplicity of suits, enjoining the actions begun and ordering all the notes to be delivered up and cancelled? It was held in *Noroian v. Bennett*[1] that these facts do not present a case of equitable jurisdiction.

The prevention of a multiplicity of suits has been said to be a "very favorite object" with a court of equity.[2] Equity consolidates such suits for two reasons: to protect the public interest in the administration of justice by preventing the clogging of court calendars, and to protect parties from being ruined by costs. But every party has a right to have the issues of his case presented squarely and without confusion; and if the issues of law and fact are not the same in each case, consolidation not only does an injustice to each party by clouding the issues of his case, but it serves no purpose, for, if each party must present different evidence, the consolidated proceeding becomes single only in name and remains multiple in fact, resulting in confusion at the trial.

Bearing in mind the purpose to be served, it would seem that a court of equity should be allowed to consolidate a number of suits, and thus expedite justice, whenever the simplicity of the issues can be preserved without slurring over the right of each party to a full hearing of his cause. Accordingly, Pomeroy states the rule to be, that equity will take jurisdiction to prevent a multiplicity of suits by one party against many or by many against one, where there is a community of interest among the many merely in the questions of law and fact involved.[3] This rule has been, however, the storm center of much controversy, and cannot be said to be firmly established. It was undoubtedly the early rule in equity that before a multitude of suits could be heard as one there must exist among the various claimants either some common title or a community of right or of interest in the subject-matter. The common cases were suits between landlord and tenants and between parson and parishioners.[4] It is possible that

[1] (February 24, 1919) 57 Cal. Dec. 238, reversing 26 Cal. App. Dec. 51.

[2] Per Chancellor Kent in Brinkerhoff v. Brown (1822) 6 Johns. Ch. 136, 151.

[3] 1 Pomeroy, Equity Jurisprudence, § 269.

[4] Adams, Equity, 199, 200.

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the limitation thus laid down by the early cases resulted from an imperfect perception of the principle involved, and a consequent attempt to define the right by enumerating the cases in which it existed. At any rate, the rule was modified in England at a comparatively early date,[5] and is certainly not the English rule today.[6] But it is asserted in all its early rigor by many American courts which deny the correctness of Pomeroy's statement.[7]

Pomeroy's rule has the equitable quality of resting, as respects its application, in the discretion of the judge.[8] The rigid rule insisted upon by some courts abolishes discretion. It creates the paradoxical situation wherein a judge may be forced to apply an equitable rule which will produce an inequitable result.[9] The cases which attack Pomeroy are remarkable for their lack of clear theoretical reasoning. They consist largely of assertions and of citations of authority. Their chief theoretical argument is that the sum of many causes of action at law, each containing no element of equitable jurisdiction, can by no possible means equal an equitable cause of action.[10] But this is only another way of saying that the avoidance of a multiplicity of suits is not of itself a ground of equitable jurisdiction, which is the point in dispute. Sometimes courts fail utterly to discern that principle of discretionary application[11] which is the basis of all equitable

[5] Mayor of York v. Pilkington (1737) 1 Atk. 282, 26 Eng. Rep. R. 180; City of London v. Perkins (1734) 3 Brown's Parliament Cas. 602, 1 Eng. Rep. R. 1524.

[6] Sheffield Water Works v. Yeomans (1866) L. R. 2 Ch. Ap. 8.

[7] Tribette v. I. C. Ry. Co. (1892) 70 Miss. 182, 12 So. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642, 2 Ames Cas. Eq. Jurisd. 74; Turner v. City of Mobile (1902) 135 Ala. 73, 33 So. 132; Vandalia Coal Co. v. Lawson (1909) 43 Ind. App. 226, 87 N. E. 47; Roanoake Guano Co. v. Saunders (1911) 173 Ala. 175, 56 So. 198; Southern Steel Co. v. Hopkins (1911) 174 Ala. 465, 57 So. 11; Watson v. Huntington (1914) 215 F. 472; and Hamilton v. Ala. Power Co. (1915) 195 Ala. 438, 70 So. 737, are the more recent important cases.

[8] What Mr. Justice Story has said with respect to injunctions might well be said of this class of cases also: "Courts of equity constantly decline to lay down any rule which shall limit their power and discretion as to the particular cases in which such injunctions shall be granted or withheld. And there is wisdom in this course, for it is impossible to foresee all the exigencies of society which may require their aid and assistance to protect rights and redress wrongs." Story, Equity Jurisprudence, (14th ed.) § 1293.

[9] It has been said that one result of the amalgamation of law and equity has been to confuse legal and equitable rules in respect to the manner of their application, and to create a tendency to apply the latter as rigidly as the former, with as little regard for the equities of the particular case. Pound, The Decadence of Equity, 5 Columbia Law Review, 20.

[10] Cf. Turner v. City of Mobile, supra, n. 7.

[11] Cf. the words of Lord Eldon: "The doctrines of this Court ought to be as well settled and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case." Gee v. Pritchard (1818) 2 Swanst. 402, 36 Eng. Rep. R. 670. See also the article by Dean Pound cited supra, n. 9.

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rules. The rule "must be of universal application", says a leading case, "and strange results might flow from its adoption."[12] The court illustrates by showing the confusion which would result from an attempt to consolidate a hundred actions arising out of a train wreck. There, plainly, separate proof would be required by each claimant to establish the fact and extent of his injury, and the rule would require the judge to dismiss the bill.

The situation was similar in the principal case. There were as many different misrepresentations as there were parties defrauded; and each misrepresentation, each reliance thereon, and the reasonability of each reliance, would have to be proved by separate witnesses. It would be almost impossible to secure justice to each party in such a complicated proceeding, and the court was clearly right in refusing to allow the suits to be consolidated.[13]

A bill will lie, under the Pomeroy doctrine, not only on the petition of the single party by or against whom the numerous suits are commenced, but also on the petition of the numerous parties who are opposed to him. The obvious difference between these cases is, that only in the former is the petitioner affected by the multiplicity complained of. This has moved some courts to deny the bill in cases of the second class.[14] On principle, however, equity's power to avoid a multiplicity of suits should not be restricted to cases where the party exposed thereto complains.[15]

So also, under the general doctrine, the party or parties seeking to avoid the multiplicity may be either plaintiff or defendant in the numerous suits.[16] The California Codes[17] provide, as a means of avoiding a multiplicity of actions, only the method of injunction. No case, except the principal case, seems to have arisen in which the court has applied the general equitable doctrine to the situation where a number of plaintiffs seek to join in

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[12] Tribette v. I. C. Ry. Co., supra, n. 7.

[13] In Hightower v. Ry. Co. (1904) 83 Miss. 708, 36 So. 82, fifty-seven persons joined to cancel notes given by them in reliance upon one single misrepresentation. Here, since there was the same fact to be proved in each case, it was possible to preserve the simplicity of the issues.

[14] Thomas v. Canning Co. (1899) 34 C. C. A. 428, 92 Fed. 422; Scottish Union Ins. Co. v. Mohlman (1896) 73 Fed. 66.

[15] (a) The public interest in the prompt administration of justice is one of the chief reasons for any bill to avoid multiplicity of suits, and it is immaterial in this regard which side brings the bill. (b) It frequently happens that the complainants must enforce their rights in one suit or not at all as in cases where the claim of, or against, each is less than the cost of an individual suit. Surely this is as cogent an equity as the fact of excessive costs to the single party involved in the numerous suits. Smith v. Bank of N. E. (1898) 69 N. H. 54, 45 Atl. 1082.

[16] Cf. cases cited Pomeroy, Equity Jurisprudence § 269 n.

[17] Cal. Civ. Code §§ 3422, 3423, Code Civ. Proc. § 526.

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equity to avoid multiplicity. Early California decisions adhere to the rigid common law rules of joinder.[18]

Equity will not take jurisdiction to prevent a multiplicity of suits when the parties complaining have no prior existing cause of action or defense, legal or equitable.[19] On the other hand, if the numerous suits are baseless,[20] or are the result of conspiracy or bad faith, a bill will lie to enjoin them.[21]

The principal case misinterprets the Pomeroy doctrine in one respect. It considers Pomeroy's phrase "a community of interest in the questions of law and fact" to refer to cases wherein a single fact is decisive of the claim of all the parties. But the court itself quotes his statement that the jurisdiction exists "where the individual claims were not only legally separate, but were separate in time, and each arose from an entirely separate and distinct transaction." The true criterion is rather that set forth by Mr. Justice Peckham: "Each case . . . . must, as we think, be decided upon its own merits, and upon a survey of the real and substantial convenience of all parties, the adequacy of the legal remedy, the situations of the different parties, the points to be contested and the result which would follow if jurisdiction should be assumed or denied; these various matters being factors to be taken into consideration upon the question of equitable jurisdiction on this ground, and whether within reasonable and fair grounds the suit is calculated to be in truth one which will practically prevent a multiplicity of litigation and will be an actual convenience to all parties, and will not unreasonably overlook or obstruct the material interests of any."[22]

A. R. R.

EVIDENCE: CORROBORATION OF TESTIMONY OF AN ACCOMPLICE.—In People v. Tobin [1] the Supreme Court again calls attention to the ambiguity of section 1111 of the Penal Code requiring the testimony of an accomplice to be corroborated by "such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." The decision is based on two early California cases decided under entirely different statutes and therefore hardly

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[18] Barham v. Hostetter (1885) 67 Cal. 272; Foreman v. Boyle (1891) 88 Cal. 290, 26 Pac. 94; Guerkink v. Petaluma (1896) 112 Cal. 306, 44 Pac. 570. But see Hillman v. Newington (1880) 57 Cal. 56.

[19] Ins. Co. v. Hoover Co. (1909) 173 Fed. 888.

[20] I. C. Ry. Co. v. Baker (1913) 155 Ky. 512, 159 S. W. 1169; Jordan v. Telegraph Co. (1904) 69 Kan. 140, 76 Pac. 396.

[21] S. P. Co. v. Robinson (1901) 132 Cal. 408, 64 Pac. 572.

[22] Hale v. Allinson (1902) 188 U. S. 56, 47 L. Ed. 380, 23 Sup. Ct. Rep. 244.

[1] (Dec. 6, 1918) 27 Cal. Dec. 768.

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in point.[2] The rule of the common law that the testimony of an accomplice, though to be looked upon with distrust, would warrant a conviction if believed by the jury,[3] has been changed by statute in nearly half of the states.[4] The necessity for such statutes is probably due to the divided jurisdiction of the court and jury in this country.[5] Thus, the California Constitution provides that judges shall not charge juries with respect to matters of fact,[6] and under this provision an instruction that the testimony of an accomplice ought to be viewed with distrust was held erroneous though authorized by an express provision in the Code.[7] It has been suggested that these statutes place upon appellate courts a duty which might more properly rest with the jury, namely, that of determining the weight of the evidence.[9] There is, however, a distinction to be drawn between the mere preponderance of the evidence and the kind of evidence sufficient to sustain a charge, the determination of the latter being one of the functions of appellate courts.[10] If the purpose of the statute is merely to require a large quantum of evidence, it would appear that any corroboration whatsoever would be sufficient. But it has been held that corroboration which merely proves the credibility of the accomplice is not sufficient.[11] The corroboration must be independent of the testimony of the accomplice and not rest on his credit. The testimony of another accomplice is not sufficient,[12] but that of the accomplice's wife is.[13] Evidence which merely corroborates the witness generally or raises a sus-

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[2] People v. Josselyn (1870) 39 Cal. 393, based on Cal. Stats. 1861, p. 588, forbidding convictions in abortion cases "by the testimony of such woman alone"; and People v. Richardson (1911) 161 Cal. 552, 120 Pac. 20, based on § 1108 Cal. Pen. Code, requiring the woman in an abortion or seduction case to be corroborated "by other evidence."

[3] Reg. v. Stubbs (1855) 7 Cox, C. C. 48; Queen v. Boyes (1861) 9 Cox C. C. 32, 1 B. & S. 311, 121 Eng. Rep. R. 730.

[4] Wigmore, Evidence, § 2056, note 10.

[5] See also People v. Clough (1887) 73 Cal. 348, 15 Pac. 5, for a different theory based on anomalous conditions of English cases.

[6] Cal. Const., Art. VI, § 19.

[7] People v. Wardrip (1903) 141 Cal. 229, 74 Pac. 744.

[8] Cal. Code Civ. Proc., § 2061, subd. 4.

[9] Wigmore, Evidence, § 2062.

[10] Joy, Evidence of Accomplices, p. 10. "The defect in the evidence is not in its quantity but in its quality." Baron Joy, however, upholds the theory that any additional evidence is sufficient to supply the needed corroboration.

[11] People v. Clough (1887) 73 Cal. 348, 15 Pac. 5; People v. Baker (1896) 114 Cal. 617, 46 Pac. 601.

[12] People v. Creegan and Becker (1898) 121 Cal. 554, 53 Pac. 1082; Powers v. Commonwealth (1901) 110 Ky. 386, 23 Ky. L. 146, 63 S. W. 976, 53 L. R. A. 245.

[13] King v. Willis (1916) 1 K. B. 933, overruling the earlier case of Rex v. Neal and Taylor (1835) 7 C. & P. 168, 32 Eng. C. L. Rep. 555; Woods v. State (1884) 76 Ala. 35.

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picion of guilt is not sufficient.[14] On the other hand, a feigned accomplice, or informer, does not come within the rule and his testimony requires no corroboration.[15]

To corroborate means to strengthen or make certain; but it is submitted that the rule in California requires not merely that the testimony of the accomplice be supported, but that it requires support by testimony of a different quality. The accomplice must be corroborated, not only in a material part of his story, but in that portion of his testimony which goes to establish the guilt of the accused; i. e., the corroborating evidence must tend to connect the defendant with the commission of the offense.[16] Under the original code section requiring evidence "which in itself, and without the aid of the testimony of the accomplice," tends to connect the defendant with the crime,[17] it was held error to instruct a jury that corroborative evidence was sufficient if it tended "in any way" to connect the defendant with the commission of the crime.[18] And the amendment to section 1111 of the Penal Code in 1911 omitting the above quoted words has been held not to change the old law.[19]

The test of the sufficiency of corroboration is this: Eliminate the evidence of the accomplice, and then if the evidence of other witnesses connects the defendant with the crime, the accomplice is corroborated.[20] Of course, corroborative evidence need not be sufficient to establish guilt, for in that event the testimony of the accomplice would not be needed.[21] Of itself, the corroborative evidence may be slight and entitled to but little consideration; nevertheless the requirements of the statute are fulfilled if there be corroborating evidence which of itself, tends to connect the defendant with the commission of the offense.[22] The statute does not require that the accomplice be corroborated in respect to every material fact, but only in respect to some of the material

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[14] People v. Ames (1870) 39 Cal. 403 (evidence "must tend, in some slight degree at least, to implicate the defendant"); People v. Melvane (1870) 39 Cal. 614; People v. McLean (1890) 84 Cal. 480, 24 Pac. 32; People v. Koenig (1893) 99 Cal. 574, 34 Pac. 238; People v. Sciaroni (1907) 4 Cal. App. 698, 89 Pac. 133.

[15] People v. Bolanger (1886) 71 Cal. 17, 11 Pac. 799; People v. Farrell (1866) 30 Cal. 316.

[16] People v. Bunkers (1905) 2 Cal. App. 197, 84 Pac. 364, 370; People v. Balkwell (1904) 143 Cal. 259, 76 Pac. 1017; People v. Josselyn (1870) 39 Cal. 393; cases cited, supra, n. 14.

[17] Cal. Pen. Code, § 1111, as enacted 1872.

[18] People v. Compton (1899) 123 Cal. 403, 56 Pac. 44.

[19] People v. Robbins (1915) 171 Cal. 466, 154 Pac. 317. Also important dissenting opinion, p. 479.

[20] Weldon v. State (1881) 10 Tex. App. 400. Approved in People v. Morton (1903) 139 Cal. 719, 73 Pac. 609.

[21] People v. Ames (1870) 39 Cal. 403.

[22] In re Buckley (1886) 69 Cal. 1, 10 Pac. 69; People v. Larsen (1893) 4 Cal. Unrep. 286, 34 Pac. 514; People v. Josselyn, supra, n. 16; People v. Sciaroni, supra, n. 14.

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facts which constitute a necessary element in the crime alleged.[23] In other words, the evidence must show that particular defendant to be the criminal or show his individual connection with the case.[24] This may be supplied by admissions or conduct on his part tending to excite suspicion,[25] or by his own confession.[26] Proof that the accused was seen near the place of the crime is not sufficient, unless coupled with the subsequent flight of the defendant,[27] or proof that the accused was near the place in company with the accomplice.[28] The sufficiency of the corroboration must be governed largely by the circumstances of each particular case. It may consist of circumstantial as well as direct evidence.[29]

The decisions show that section 1111 of the Penal Code cannot be relied upon as a well-defined rule competent to solve all questions of corroboration. The question of corroborative evidence is purely one of the weight of certain facts. The facts in every case will differ and no two will be found exactly alike. No statutory rule can be devised that will fit every varying circumstance. It would seem, therefore, that an unnecessary burden has been placed upon appellate courts, namely, of determining a question which might far better rest with the jury. Of what value as an authority is a decision which finds that "the figment of evidence in support of the testimony of the accomplice does not rise to the dignity of corroboration?"[30] The statute itself often works a miscarriage of justice.[31]

Fundamentally the question is based on a conflict between the desire to bring to justice the man against whom there exists a grave suspicion of guilt and the principle that substantial independent evidence should be furnished to remove the taint of a participant's testimony. Can this difficulty be solved under a rigid statute in an apellate court? It is submitted that the rule of the common law leaving all the evidence to the jury is preferable. At common law it was the duty of the court to caution the jury that the testimony of an accomplice was to be looked

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[23] People v. Josselyn, supra, n. 16.

[24] People v. Garnett (1866) 29 Cal. 622; People v. McLean, supra, n. 14; People v. Hong Tong (1890) 85 Cal. 171, 24 Pac. 726; People v. Morton (1903) 139 Cal. 719, 73 Pac. 609.

[25] People v. Cleveland (1875) 49 Cal. 577; People v. Collins (1883) 64 Cal. 293, 30 Pac. 847; People v. Sternberg (1896) 111 Cal. 3, 43 Pac. 198.

[26] People v. Richardson (1911) 161 Cal. 552, 120 Pac. 20; People v. Josselyn, supra, n. 16; Patterson v. Commonwealth (1887) 86 Ky. 313, 9 Ky. L. 481, 5 S. W. 387, 765; Shaefer v. State (1893) 93 Ga. 177, 18 S. E. 552.

[27] Smith v. Commonwealth (1891) 17 S. W. 182 (Ky.); People v. Koenig, supra, n. 14.

[28] People v. Barker (1896) 114 Cal. 617, 46 Pac. 601.

[29] People v. Blunkall (1916) 31 Cal. App. 778, 161 Pac. 997.

[30] People v. Koenig, supra, n. 14.

[31] People v. Smith (1893) 98 Cal. 218, 33 Pac. 58.

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upon with distrust, but they were not forbidden to return a verdict of guilty if they believed the accomplice spoke the truth.[32] The rule forbidding a judge to comment on the testimony is but one side of the tendency of recent times to cut away the power of the court.[33] Nothing has been suggested to take its place but the right of unlimited appeal. The real remedy is to restore the personal control of judges over jury trial. Their power to set aside verdicts, if properly exercised, would prove an ample safeguard. And finally the strict rules of the statute should give way before the instructions of the court in individual cases.[34]

G. H.

INJUNCTION: POWER TO ENJOIN PEACEFUL PICKETING.—The question presented in the case of *Rosenberg v. The Retailer's Association*[1] is the subject of peaceful picketing. In the lower court judgment as given restrained the defendant from interfering, harassing, or obstructing the plaintiff in the conduct of his business by means of threats, menace, or intimidation. It is the claim of the plaintiff that this judgment means nothing and asks that the defendant be enjoined from peaceful picketing. The court announced in its judgment that "picketing is inherently illegal for the reason that it is inseparably associated with acts that are indisputably illegal. Accordingly, it has been held that there can be no such a thing as peaceful picketing any more than there can be peaceful mobbing."

By California decisions it has been established that united labor has the right to enforce a boycott by means of peaceful oral persuasion. Menace, intimidation, and coercion cannot be resorted to.[2] The question whether picketing is a peaceful and lawful means is one that has also received frequent judicial consideration. In the case of Pierce v. Stablemen's Union,[3] decided by the Supreme Court in 1909, the decision was very definitely based upon the conception that the violence and coercion were

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[32] Supra, n. 3.

[33] Cal. Const., Art. VI, §4½, providing for review of case "including the evidence." Note the recent bill introduced in the House of Representatives forbidding Federal judges to comment on the evidence in jury trials (Feb. 5, 1918).

[34] Wigmore, Evidence, § 2057: "It may be noted, also, that the legislative creation of a rule of law, by introducing detailed refinements of definition to be applied by jurors has merely tended to confuse them with sounds of words and to place in the hands of counsel a set of juggling formulas with which to practice upon the chance of obtaining a new trial."

[1] (1918) 27 Cal. App. Dec. 769.

[2] Goldberg Bowen v. Stablemen's Union (1906) 149 Cal. 429, 86 Pac. 806, 117 Am. St. Rep. 145; Pierce v. Stablemen's Union (1909) 156 Cal. 70, 103 Pac. 324; Crescent Feather Co. v. United Upholsterers' Union (1908) 153 Cal. 433, 95 Pac. 871.

[3] Supra, n. 2.

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extremely actual though not open. The view there expressed suggests that of several courts; that there is, and can be, no such a thing as peaceful picketing.[4]

Other courts maintain with equal tenacity that there is and may be such a thing as peaceful picketing.[5] In cases of the latter class the courts generally discuss only picketing for purposes of observation and of peaceably persuading employees to join the strike. There seems to be little authority on picketing which aims to enlist the sympathy of the general public.[6] But it is not perceived why the rule should be different in this situation. In a jurisdiction like California which concedes legality to the boycott provided it be peaceable in its nature, it would seem that the legality of the means ordinarily employed in picketing should likewise depend upon their actual peaceableness. If trade unions are made to understand that picketing will be allowed only so long as it is limited to legitimate persuasion, and will be enjoined, when it becomes coercive or intimidatory, they might, one would suppose, conduct themselves strictly in accordance with these requirements. If the coercion does appear, may we not rely upon the persons seeking an injunction to make known the facts of the court?

It is also announced in the opinion of the principal case that the growing tendency is to regard picketing as inherently illegal,

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[4] Atkinson Ry. Co. v. Gee (1905) 139 Fed. 582; Franklin Union No. 4 v. People (1906) 220 Ill. 355, 77 N. E. 176; Vegelahn v. Guntner (1896) 167 Mass. 92, 44 N. E. 1077, 57 Am. St. Rep. 443. But see dissenting opinions in this case. See also Beck v. Ry. Teamsters' Protective Union (1898) 118 Mich. 497, 77 N. W. 13; Pierce v. Stablemen's Union, supra, n. 2; Barnes Co. v. Chicago Typographical Union (1908) 232 Ill. 424, 83 N. E. 940; Jones Glass Co. v. Glass Blowers' Assn. (1907) 72 N. J. Eq. 653, 66 Atl. 953.

[5] Karges Furniture Co. v. Amalgamated Woodworkers' Local Union (1905) 165 Ind. 421, 75 N. E. 877; Everett Waddey Co. v. Richmond Typographical Union (1906) 105 Va. 188, 53 S. E. 273, 5 L. R. A. (N. S.) 792; Foster v. Retail Clerks' International Protective Assn. (1902) 39 Misc. Rep. 48, 78 N. Y. Supp. 860, 866; Jones v. Maher (1909) 62 Misc. Rep. 388, 116 N. Y. Supp. 180; Mills v. U. S. Printing Co. of Ohio (1904) 99 App. Div. 605, 91 N. Y. Supp. 185; Pope Motor Car Co. v. Keegan (1906) 150 Fed. 148; Goldfield Consolidated Mining Co. v. Goldfield Miners' Union (1908) 159 Fed. 500, 521; Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Assn. (1899) 59 N. J. Eq. 49, 46 Atl. 208; Fletcher Co. v. Int. Assn. of Machinists (1903) N. J. Eq. 55 Atl. 1077; Iron Molders Union v. Allis-Chalmers Co. (1908) 166 Fed. 45, 20 L. R. A. (N. S.) 315; Jones v. Van Winkle Gin & Machine Works (1907) 131 Ga. 336, 62 S. E. 236; Searle Mfg. Co. v. Terry (1905) 56 Misc. Rep. 265, 106 N. Y. Supp. 438; Levy v. Rosenstein (1900) 66 N. Y. Supp. 101; Krebs v. Rosenstein (1900) 31 Misc. 661, 66 N. Y. Supp. 42; Rogers v. Evarts (1891) 1 N. Y. Supp. 264; Heitkamper v. Hoffman (1917) 99 Misc. Rep. 543, 164 N. Y. Supp. 533; St. Germain v. Bakery & Confectionery Union No. 9 (1917) 97 Wash. 282, 166 Pac. 665; Root v. Anderson (1918) 207 S. W. 255 (Mo.); Truax v. Carrigan (1918) 176 Pac. 570 (Ariz.).

[6] Foster v. Retail Clerks' International Protective Assn., supra, n. 5.

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and as authority cites the Federal case of Atchison, etc. Ry. Co. v. McGee,[7] which was decided in the Federal courts in 1905. The court there says: "There is and can be no such thing as peaceful picketing any more than there can be chaste vulgarity or peaceful mobbing or lawful lynching." The Supreme Court of Michigan said in 1898 in the case of Beck v. Railway Protective Union,[8] "It will not do to say that these pickets are thrown out for the purpose of peaceable argument and persuasion. They are intended to intimidate and coerce." This same conclusion was reached in Illinois Supreme Court in the case of Chicago Typographical Union[9] decided in 1908. The court gives its approval to the following language used by the Michigan court: "To picket complainant's premises in order to intercept their teamsters or persons going there to trade is unlawful. It itself is an act of intimidation and an unwarrantable interference with the right of free trade. The highways and the public streets must be free to all for the purposes of trade, commerce and labor. The law protects the buyer, the seller, the merchant, the manufacturer and the laborer in the right to walk the streets unmolested. . . . . The very fact of establishing a picket line is evidence of an intention to annoy, embarrass and intimidate, whether physical violence is resorted to or not. . . . . Any picket line must result in annoyance both to the employer and the workmen, no matter what is said or done, and to say that the court is to determine by the degree of annoyance whether it shall be stopped or not would furnish no guide, but leave the question to the individual notions or bias of the particular judge." The Massachusetts court also gave its approval to the same view in the case of Vegelahn v. Guntner.[10] The court said in this case: "No one can lawfully interfere by force or intimidation to prevent employers or persons employed or wishing to be employed from the exercise of these rights. Intimidation is not limited to threats of violence or of physical injury to person or property. It has a broader significance, and there may also be a moral intimidation which is illegal."

On the other hand, in the case of Pope Motor Car Co. v. Keegan[11] decided in 1906, the court says: "Peaceful picketing used by workmen either singly or in combination to induce others to quit or refuse employment is lawful provided the pickets are so limited in numbers as not to amount to intimidation." In 1909 the Federal court in the case of Goldfield Consolidated Mines Co. v. Goldfield Miners Union[12] says: "Peaceful picketing,

[7] (1905) 139 Fed. 582.
[8] (1898) 118 Mich. 497, 77 N. W. 13.
[9] (1908) 232 Ill. 424, 83 N. E. 940.
[10] (1896) 167 Mass. 92, 44 N. E. 1077, 57 Am. St. Rep. 443.
[11] (1906) 150 Fed. 148.
[12] Supra, n. 5; Iron Moulders' Union v. Allis Chalmers Co. (1908) 166 Fed. 45, 20 L. R. A. (N. S.) 315.

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in theory, is not only possible, but permissible, and as long as it is confined strictly, and in good faith, to gaining information and to peaceful persuasion, and argument, it is not forbidden by law." In an opinion rendered by the Federal court in 1917 in the case of Tri-City Central Trades Council v. American Foundries[13] the court says: "Striking employees have a lawful right to place pickets in the streets leading to their employers' plant, to ascertain who are continuing or seeking employment there, and to persuade, but not to coerce them not to do so, and the maintenace of such pickets and attempts to persuade employees to cease working cannot be enjoined."

Undoubtedly, as we have seen, there are decisions which hold that all picketing is unlawful and subject to injunction. But we question the accuracy of the declaration made in the principal case that the weight of authority and the growing tendency are to regard all picketing as inherently illegal.[14]

T. A. M.

PERSONS: AGE OF CONSENT FOR MARRIAGE: ISSUING LICENSE WITHOUT PARENTS' APPROVAL.—The case of *Johnson v. Alexander*[1] placed squarely before an Appellate Court of California for the first time two important questions: (1) What is the "age of legal consent" for the purpose of marriage as used in the Civil Code,[2] and (2) what is the effect of a marriage solemnized according to the forms outlined in the Code except that the license was issued to a female fifteen years of age without the consent of the parents or guardian as prescribed by statute.[3] The first point had been referred to in a *dictum* previously, and fifteen years for females and eighteen years for males, as provided in

[13] (1917) 238 Fed. 728. In the United States District Court for the Southern District of Illinois, the Judge, in granting an injunction, said: "There is no such thing as peaceful picketing. You might as well talk about peaceful violence. You may as well think of peaceful war as peaceful picketing." On appeal to the Circuit Court of Appeals of the Seventh Circuit, the decree of the District was reversed. The case has now been carried on certiorari to the Supreme Court of the United States, where it has been recently argued.

[14] In addition to cases cited in preceding notes, the case of In re Langell (1914) 178 Mich. 305, 144 N. W. 841, 50 L. R. A. (N. S.) 412, adheres to the view that all picketing is illegal. An observation in the note to this case, in the last citation, seems to contain the suggestion for the California court's broad statement as to the "growing tendency". The generalization in the note mentioned is in these words: "It may be said, however, that the majority of the cases cited in the present, as well as in the earlier note, recognize, or at least, do not deny, that picketing may be lawful in some circumstances; in other words, hold or concede that picketing is not unlawful *per se*, and should not as much be enjoined, although there is discernible a growing tendency to accept the contrary view adopted in Re Langell, upon the ground that, as a practical matter, there can be no such thing as peaceable picketing, especially where there are a considerable number of picketers." But we fail to find justification even for this guarded statement.

[1] (Dec. 13, 1918) 27 Cal. App. Dec. 823.

[2] § 82, subd. 1.

[3] Cal. Civ. Code, § 69.

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section 56 of the Civil Code, had been stated as the ages of consent.[4] This view was adopted by the principal case. The code section[5] involving the second point had not been definitely construed before, but a case under the old marriage act of 1850[6] was cited to show, that while a third party joining in marriage a male under twenty-one or a female under eighteen may be guilty of a misdemeanor, the marriage is neither void nor voidable. The same principle, the court holds, applies to a clerk issuing a license without the consent of the parents or guardian, as required by the present law.

At common law there could be no question of parental consent where males had attained the age of fourteen and females the age of twelve years.[7] If the infants were under seven years of age the marriage was absolutely void, but parties over seven years of age and under the age of consent, could enter into a voidable marriage. No form was required, mutual assent and cohabitation between the parties being the only requisites.[8] Statutes providing different age limits and prescribing certain forms to be observed in the celebration of marriage have been generally enacted. Frequently two provisions are found with reference to age, one fixing the ages above which infants may consummate marriage (usually from 15 to 18) and one requiring parental consent where parties are under other designated ages (usually 18 for females and 21 for males). Rarely, however, have they stated definitely what the effect of a failure to comply with their provisions shall be, and the general attitude of the courts toward these laws is well expressed by the widely quoted language of the United States Supreme Court: "No doubt a statute may take away a common-law right; but there is always a presumption that the legislature has no such intention, unless it be plainly expressed." Therefore, in speaking of the legislature's control of marriage, the Court continues, "Whatever directions they may give respecting its formation or solemnization, courts have usually held a marriage good at common law to be good notwithstanding the statutes, unless they contain express words of nullity."[9]

In accord with this view courts have usually held that where statutes change the common law age of consent, marriages by parties under the designated ages are not void, but merely voilable. They are in fact good for all civil purposes until action is brought by the party under age to annul such mar-

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[4] Matter of Guardianship of Ambrose (1915) 170 Cal. 160, 149 Pac. 43.
[5] Supra, n. 3.
[6] Hunter v. Milam (1895) 5 Cal. Unrep. 107, 41 Pac. 332.
[7] Koonce v. Wallace (1859) 7 Jones Law (N. C.) 194.
[8] Sharon v. Sharon (1889) 79 Cal. 633, 22 Pac. 26.
[9] Meister v. Moore (1877) 96 U. S. 76. See also notes, 7 Ann. Cas. 784; 14 Ann. Cas. 953; L. R. A. 1915 E, 113.

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riage.[10] The bigamy laws apply to a second marriage by either party,[11] and the male is liable under a criminal statute applicable to delinquent husbands.[12] With reference to forms prescribed by statute for the celebration of marriage the same interpretation has governed and the common-law marriage has been upheld unless made expressly void. Some courts even interpret the word void to mean voidable.[13]

What is sometimes called a minority view prevails in some states, but it is really not so much a minority view of courts as of legislatures. Some statutes are so worded as to leave no question of interpretation, as where common-law marriages are made expressly void. Among these jurisdictions are North Dakota, where the statute provides that marriages shall be entered into "only as provided by law";[14] and California. In this state, since the amendment of the Civil Code in 1895,[15] common-law marriages are not valid.[16] The question in this jurisdiction is, then, as to which parts of the Civil Code governing marriage are directory and which mandatory.

There are, according to the express provision of the Code,[17] only three kinds of marriage that are absolutely void from the beginning, viz.: incestuous marriages, marriages between persons of different races, and bigamous marriages. All others are valid or voidable.[18]

As to the question of age, only marriages by females under fifteen, or males under eighteen, years of age without the parents' or guardian's consent are voidable.[19] Consent by others than the parties to the contract is unnecessary if the female is fifteen years old and the male eighteen.[20] Section 69 of the Civil Code is, therefore, to this extent merely directory. Furthermore, if the parties are above seven years of age and have parental sanction, as prescribed by the Code, an absolutely bind-

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[10] Willits v. Willits (1906) 76 Nebr. 226, 107 N. W. 379, 5 L. R. A. (N. S.) 767. New York fixes eighteen as the age for both parties, Padula v. Padula (1916) 160 N. Y. Supp. 833.

[11] Garner v. State (1913) 9 Ala. App. 60, 64 So. 183.

[12] State v. McPherson (1913) 72 Wash. 371, 130 Pac. 481.

[13] State v. Parker (1890) 106 N. C. 711, 11 S. E. 517.

[14] Schumaker v. Great N. Ry. Co. (1912) 23 N. D. 231, 136 N. W. 85. Brinkerhoff v. Bostwick (1885) 99 N. Y. 185, 1 N. E. 663 is quoted to the effect that "such expressions as 'required by law,' 'regulated by law,' 'allowed by law,' 'made by law,' 'limited by law,' 'as prescribed by law,' 'a law of the state,' are of frequent occurrence in the Codes and other legislative enactments; and they are always used as referring to statutory provisions only."

[15] Cal. Civ. Code, § 55.

[16] Norman v. Norman (1898) 121 Cal. 620, 54 Pac. 143, 66 Am. St. Rep. 74, 42 L. R. A. 343; Estate of Shipp (1914) 168 Cal. 640, 144 Pac. 143.

[17] Cal. Civ. Code, §§ 59, 60, 61.

[18] People v. Souleotes (1915) 26 Cal. App. 309, 146 Pac. 903.

[19] People v. Gonzales (1907) 6 Cal. App. 255, 91 Pac. 1013; People v. Beevers (1893) 99 Cal. 286, 33 Pac. 844.

[20] Matter of Guardianship of Ambrose, supra, n. 4.

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ing marriage is formed.[21] This is practically the uniform holding of all courts, although Michigan[22] held a marriage invalid where parental consent was not given, and New York, because of several conflicting statutes, was forced to the conclusion that, though consent had been given to the marriage of a seventeen-year-old girl by her parents, the right of annulment still existed.[23]

On principle, the holding of the instant case with reference to age is not open to any objection considering the Code provisions. It is clear that marriages of infants are not made expressly void by statute and that the most reasonable interpretation of sections 56, 69, and 82 of the Civil Code taken together is that section 56 fixes the "age of legal consent." That caution should be used in declaring marriages void is also uniformly conceded because of the disastrous effects following such action.

The question as to whether the procuring of a license is absolutely essential before marriage may be contracted in California is said by the supreme court to be still an open and debatable question.[24] But it may be doubted whether this observation is wholly in accord with the code and with other expressions of the same court. Clearly, "Consent alone will not constitute marriage; it must be followed by a solemnization authorized"[25] by the Code, and "it is giving the word 'solemnization' too narrow a meaning to confine it to the mere ceremony before the officer or minister"; for "it should be held to include the issuing of the license and the record of the certificate; with the publicity incidental to the license and record; that the purpose of the section must be to facilitate the proof of marriages by requiring their existence to be made public."[26] This interpretation seems in accord with the code provisions.[27] However, the principal case did not turn on the question of the necessity of a license, but upon the point as to the effect of the issuance of a license by the clerk in violation of the code provisions.

The finding of the court accords with the provision in the statute that "non-compliance with its provisions by others than a party to a marriage does not invalidate it."[28] Such, too, is the uniform holding of other jurisdictions.[29] The officer violat-

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[21] People v. Souleotes, supra, n. 18.

[22] People v. Schoonmaker (1899) 119 Mich. 242, 77 N. W. 934.

[23] Kruger v. Kruger (1910) 122 N. Y. Sup. 23. See note on Trial Marriages in New York, 26 Yale Law Journal, 622.

[24] See cases, supra n. 16.

[25] Cal. Civ. Code, § 55; cases, supra, n. 16.

[26] Sharon v. Sharon (1888) 75 Cal. 1, 16 Pac. 345.

[27] Cal. Civ. Code, § 68.

[28] Id.

[29] Gray v. Lentz (1917) 173 N. C. 343, 91 S. E. 1024, L. R. A. 1917 E, 863; Browning v. Browning (1913) 89 Kans. 98, 130 Pac. 852, Ann. Cas. 1914 C, 1288; L. R. A. 1916 C, 737; note, 1917 E, 868; 18 R. C. L., § 70.

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ing the act may be subjected to punishment, and frequently statutes provide a penalty, but the marriage is not affected.[80]

On the whole the principal case accords with the tendency to declare no act good at common law invalid unless the statutory provisions expressly so provide, and is practically in complete harmony with other courts on the questions of age and requirements of form.

D. J. W.

TORTS: LIABILITY OF PARENT OWNING AUTOMOBILE FOR INJURIES RESULTING FROM NEGLIGENT DRIVING BY MINOR CHILD.—In the case of *Watkins v. Clark*,[1] decided by the Supreme Court of Kansas, Nov. 9, 1918, the plaintiff sued the defendant for personal injuries suffered in an automobile accident. The defendant owned the machine, but at the time of the accident it was being driven by his minor daughter. He had purchased the car for the use of his family and had granted general permission to his daughter to use it at any time she pleased. Other members of the family enjoyed the same privilege. On the occasion of the accident she was on a pleasure trip of her own, accompanied by a young lady friend.

The Court upheld the defendant's demurrer to this set of facts, basing its opinion upon the fact that the mere ownership of the car did not render the father liable even when it was operated by his own minor child, unless a relationship of agency was shown.

The question of the father's liability in such cases has raised conflicting decisions in many jurisdictions. Of course it is universally admitted that the mere fact of ownership does not in itself render the father liable. Nor does the mere relationship of parent make him any more liable for this, than for any other tort of his child.[2]

There is also practical unanimity of opinion that the father is liable if the child is acting as his agent in driving the machine.[3] And in accordance with the general principles of agency he is not liable if the child steps out of his position as agent by making a deviation from the father's business for his own pleasure.[4] Similarly the parent is not liable if the child has taken the car against his command.[5]

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[80] Id.

[1] 176 Pac. 131.

[2] Erlick v. Heis (1915) 193 Ala. 669, 69 So. 530.

[3] Morrison v. Clark (1915) 14 Ala. App. 323, 70 So. 200; Daggy v. Miller (1917) (Iowa) 162 N. W. 854; Farnham v. Clifford (1917) (Me.) 101 Atl. 468; Cutts v. Davison (1916) 184 S. W. 921 (Mo. App.).

[4] Jennings v. Okin (1916) 88 N. J. Law 659, 97 Atl. 249; Cohen v. Meador (1916) 119 Va. 429, 89 S. E. 876.

[5] Sultzbach v. Smith (1916) 174 Ia. 704, 156 N. W. 673, L. R. A. 1916F 228; Johnston v. Cornelius (1916) 193 Mich. 115, 159 N. W. 318; Maher v. Benedict (1908) 123 App. Div. 579, 108 N. Y. Supp. 228.

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But in cases with facts similar to the principal one there is a decided divergence of opinion. If the car has been purchased for the pleasure of the family and is being used for that purpose at the time of the accident most courts agree in holding the father liable for his minor child's negligence, if at the time he is driving other members of the family.[6] In such cases the minor is manifestly the agent of his father. But if the child has been granted permission to use the machine for his own purposes and at the time of an accident is driving alone, or at least with persons other than members of the family, the father is not liable according to the view of the Kansas Court. Certain other jurisdictions[7] agree in denying liability under such circumstances. However, a contrary view obtains in some states,[8] and is based upon the somewhat attenuated theory that the minor child in amusing himself is acting as agent in behalf of his father. A parent, these courts argue, owes a duty of recreation to his children and when they employ themselves in the pursuit of such recreation they become his agent. Burch, J., in the decision of the principal case, waxes sarcastic over this theory:

"So, if daughter took her friend riding, she might think she was out purely for the pleasure of herself and her friend, but she was mistaken; she was conducting father's 'business' as his 'agent'. . . . . If son took his best girl riding, *prima facie* it was father's little outing by proxy, and if any accident happened, *prima facie,* father was liable."

It is certainly stretching the principles of agency a great deal to say that my minor son is acting as my agent when he amuses himself. Would he be my agent if he batted the baseball I gave him through the neighbor's window? The answer seems clear.

But all the jurisdictions agree that no such doctrine applies if the automobile is not a pleasure car.[9] The minor who takes his father's business car with which to amuse himself is not his agent. And it is also universally agreed that if a parent

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[6] Denison v. McNorton (1916) 228 Fed. 401; Smith v. Jordan (1912) 211 Mass. 269, 97 N. E. 761; McNeal v. McKain (1912) 33 Okla. 449, 126 Pac. 742, 41 L. R. A. (N. S.) 775.

[7] Woods v. Clements (1917) 113 Miss. 720, 74 So. 422; Doran v. Thomsen (1908) 76 N. J. Law 754, 71 Atl. 296, 19 L. R. A. (N. S.) 335, 131 Am. St. Rep. 677; Van Blaricom v. Dodgson (1917) 220 N. Y. 111, 115 N. E. 443; McFarlane v. Winters (1916) 47 Utah 598, 155 Pac. 437.

[8] Lewis v. Steele (1916) 52 Mont. 300, 157 Pac. 575; Davis v. Littlefield (1914) 97 S. C. 171, 81 S. E. 487; Allen v. Bland (1914) (Tex.) 168 S. W. 35; Birch v. Abercrombie (1913) 74 Wash. 486, 133 Pac. 1020.

[9] Parker v. Wilson (1912) 179 Ala. 361, 60 So. 150, 43 L. R. A. (N. S.) 87; Reynolds v. Buck (1905) 127 Iowa 601, 103 N. W. 946.

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permits his car to be driven by a minor child who is under the age set by statute for an operator of a car, he is liable.[10]

In California the parent's liability is fixed by statute and no chauffeur's license will be issued to a minor except upon the parent joining in the application, who thereby renders himself jointly and severally liable for any damage occurring by reason of the minor's negligence in operating the car.[11]

Michigan attempted to fix liability upon the owner of a car for all damages resulting from its operations[12] by anyone except a thief, but the Supreme Court of Michigan declared the act unconstitutional in that it made even the most careful owner liable for the negligence of a wilful trespasser who did not intend actually to steal the automobile.[13] Had the statute been more carefully framed, there seems no reason to doubt that it would have been upheld.

In the early days of the automobile it was held to be a dangerous agency[14] and liability attached to the parent upon that doctrine, but this view has been abandoned and everywhere now an automobile is held not to be a dangerous instrumentality.[15] Though of course if the parent allow an incompetent child to operate the machine, in such hands it becomes a dangerous agency and liability results.[16] And similarly if the machine be seriously out of order.[17]

The increasing use of the automobile and consequent frequency of accidents make almost imperative some kind of legislative protection for the pedestrian who is injured by the negligence

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[10] Walker v. Klopp (1916) 99 Neb. 794, 157 N. W. 962, L. R. A. 1916E 1292; Taylor v. Stewart (1916) 172 N. C. 203, 90 S. E. 134.

[11] Cal. Stats., 1917, § 24, Ch. 218.

[12] Subd. 3, § 10, Act 318 of Public Acts of 1909 (Mich.).

[13] Daugherty v. Thomas (1913) 174 Mich. 371, 140 N. W. 615, 45 L. R. A. (N. S.) 699.

[14] Ingraham v. Stockamore (1909) 63 Misc. 114, 118 N. Y. Supp. 399. Cf. opinion of McFarland, J., In Re Berry (1905) 147 Cal. 523, 82 Pac. 44.

[15] Fielder v. Davison (1913) 139 Ga. 509, 77 S. E. 618; Premier Motor Mfg. Co. v. Tilford (1916) 111 N. E. 645, 61 Ind. App. 164; Newbrand v. Kraft (1915) 169 Iowa 444, 151 N. W. 455, L. R. A. 1915D 691; Tyler v. Stephan (1915) 163 Ky. 770, 174 S. W. 790; Linville v. Nissen (1913) 162 N. C. 95, 77 S. E. 1096; Cunningham v. Castle (1908) 127 App. Div. 580, 111 N. Y. Supp. 1057; Danforth v. Fisher (1908) 75 N. H. 111, 71 Atl. 535, 21 L. R. A. (N. S.) 93, 139 Am. St. Rep. 670; Hartley v. Miller (1911) 165 Mich. 115, 130 N. W. 336, 33 L. R. A. (N. S.) 81; Birch v. Abercrombie, supra, n. 8; Steffen v. McNaughton (1910) 142 Wis. 49, 124 N. W. 1016, 26 L. R. A. (N. S.) 382, 19 Ann. Cas. 1227.

[16] Parker v. Wilson (1912) 179 Ala. 361, 60 So. 150, 43 L. R. A. (N. S.) 87; Allen v. Bland (1914) (Tex. Civ. App.) 168 S. W. 35.

[17] Texas Co. v. Veloz (1913) (Tex. Civ. App.) 162 S. W. 377.

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of youthful and irresponsible drivers. The California Statute,[18] in this respect, presents a good example.

C. J. S.

WATERS: CONVEYANCE OF RIPARIAN RIGHTS TO NON RIPARIAN OWNER.—An important decision, which settles, for California at least, what has long been a mooted question as to riparian rights, has just appeared in the case of Miller & Lux Incorporated v. J. G. James Company et al.[1] An upper owner carved out of a riparian tract a parcel of land not abutting on the stream and granted it with the stipulation in the conveyance that the grantee should enjoy the same privileges as to the riparian use of the water as if the ownership of the land had continued in the grantor as part of the original riparian tract. The court held that such grantee might, under the common law of riparian rights, enjoy the reserved riparian right even as against a lower riparian owner not a party to the transaction. Text witers had expessed the opinion that the reverse would be held.[2] Mr. Chandler of the California Water Commission voiced the hope[3] that such land might be held to be non-riparian in accord with the view set forth in Wiel on Water Rights in the Western States.[4]

It has long been settled that access to the stream is necessary for the enjoyment of the so-called riparian right or privilege.[5] The right arises from the fact that the land has natural access to the stream. At first the riparian right was regarded as an "incident" to the ownership of the land and was so termed by Justice Story in Tyler v. Wilkinson[6] and by Chancellor Kent in commenting on that case.[7] According to the late Professor Hohfeld's classification[8] it might be termed a "privilege", but it has latterly been described in repeated decisions as a right identified with the realty and is said to be "part and parcel of the land."[9] Where the land has natural access to the stream

[18] Supra, n. 11.

[1] (Feb. 8, 1919) 57 Cal. Dec. 166.

[2] Wiel, Water Rights in the Western States (3d ed.) pp. 900-11; Wiel, Origin and Comparative development of the Law of Watercourses in the Common Law and in the Civil Law, 6 California Law Review, 357; Chandler, Elements of Western Water Law (Rev. ed.) p. 21.

[3] Supra, n. 2.

[4] Id.

[5] Gould on Waters, p. 297; Farnham on Waters, § 463; Mason v. Hill (1835) 5 Barn. & Adol. 1, 110 Eng. Rep. R. 602; Stockport Waterworks Co. v. Potter (1864) 3 H. & C. 300, 159 Eng. Rep. R. 545; Webb v. Portland Mfg. Co. (1838) 3 Sumn. 189, Fed. Cas., No. 17, 322; Lux v. Haggin (1886) 69 Cal. 255, 10 Pac. 674.

[6] (1827) 4 Mason 397, Fed. Cas., No. 14,312.

[7] 3 Kent's Comm. (14th ed.) p. 439; Wiel, Water Rights in the Western States (3d ed.) p. 771.

[8] Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale Law Journal, 16, 55.

[9] Lux v. Haggin, supra, n. 5; Duckworth v. Watsonville etc. Co. (1907) 150 Cal. 520, 89 Pac. 338; Miller v. Madera Canal etc. Co. (1909) 155 Cal. 59, 99 Pac. 502; Miller & Lux v. Enterprise Co. (1915) 169 Cal. 415,

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the owner may use the water, but no one else may take the water unless it actually flows by his land.[10] This has been repeatedly recognized as the correct doctrine by the Supreme Court of California.[11] Nor has the riparian owner the right as against a lower-riparian owner to sell water for use on non-riparian land.[12] The requirement of physical access has been emphasized in cases where the contact with the stream has been broken by dry seasons,[13] by the shifting of the channel,[14] and by grant.[15] The land in these cases has been held to lose its riparian character.

It has uniformly been held that the riparian right might be preserved between parties to the grant.[16] These cases have arisen between the immediate parties to the transaction and are based on the theory that the effect of the grant was simply to "estop the grantor to complain."[17] No case had theretofore given full consideration to the question and clearly decided that the

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147 Pac. 567; Union Min. Co. v. Dangberg (1897) 81 Fed. 73; Miller & Lux Inc. v. J. G. James Co. et al, supra, n. 1.

It is perhaps unfortunate that the courts have abandoned the earlier conception that the riparian right was merely an incident and now identify it as a part of the land for if tested by strict logic this latter conception does not seem as appropriate. It was upon the idea, that the riparian right was a part of the land, that the court apparently in large measure based its decision.

[10] The restriction of the use of the water to those bordering on the stream was based originally on the idea that otherwise a trespass would become necessary in order to reach the water. Wiel, Water Rights in the Western States (3d ed.), p. 759. If the grantor who owns the riparian rights by his grant preserves access to the stream for the non-abutting tract, the contention that the severed tract would become non-riparian loses some of its force. The grantee would have his right of access even if the tract did not border on the stream. Yet, mere right of access is not determinative in every case, for a riparian proprietor admittedly cannot as against other riparian owners confer any rights on a non-riparian owner merely by giving the latter access to the stream through riparian land.

[11] Lux v. Haggin, supra, n. 5; Duckworth v. Watsonville Co. supra, n. 9; Turner v. James Canal Co. (1909) 155 Cal. 82, 99 Pac. 520, 132 Am. St. Rep. 59, 22 L. R. A. (N. S.) 401, 17 Ann. Cas. 823; Hudson v. Dailey (1909) 156 Cal. 617, 105 Pac. 748; Gallatin v. Corning Irrigation Co. (1912) 163 Cal. 405, 126 Pac. 864 Ann. Cas. 1914A 74; Palmer v. Railroad Commission (1914) 167 Cal. 163, 138 Pac. 997.

[12] Heilbron v. Land & Water Co. (1889) 80 Cal. 189, 22 Pac. 62; Gould v. Eaton (1897) 117 Cal. 539, 49 Pac. 577, 38 L. R. A. 181.

[13] Gutierrez v. Wege (1905) 145 Cal. 730, 735, 79 Pac. 449.

[14] Wholey v. Caldwell (1895) 108 Cal. 95, 41 Pac. 31, 49 Am. St. Rep. 64, 30 L. R. A. 820.

[15] Gould v. Stafford (1891) 91 Cal. 146, 27 Pac. 543; Alta Land Co. v. Hancock (1890) 85 Cal. 219, 229, 24 Pac. 645, 20 Am. St. Rep. 217; Anaheim Water Co. v. Fuller (1907) 150 Cal. 327, 88 Pac. 978.

[16] Rose v. Mesmer (1904) 142 Cal. 322, 75 Pac. 905; Anaheim Water Co. v. Fuller, supra, n. 15; Strong v. Baldwin (1908) 154 Cal. 159, 97 Pac. 178, 129 Am. St. Rep. 149; Verdugo Water Co. v. Verdugo (1908) 152 Cal. 655, 93 Pac. 1021; Hudson v. Dailey, supra, n. 11; Copeland v. Fairview etc. Co. (1913) 165 Cal. 148, 131 Pac. 119.

[17] California Pastoral etc. Co. v. Madera etc. Co. (1914) 167 Cal. 78, 86, 138 Pac. 718, L. R. A. 1916B, 1015n.

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effect of the grant was to transfer or preserve the right as a riparian right.[18] An opinion has been expressed in connection with a somewhat similar situation that the grantee does not by virtue of the principle of estoppel acquire a riparian right strictly speaking, but a new and entirely distinct right.[19] The original riparian owner has placed himself in a position where he cannot personally object to the use of the water by the new claimant. The decisions have, however, not prejudiced the determination of this particular question as regards third parties, the court usually expressly reserving this point.[20]

In the absence of stipulation, the grant of non-abutting lands by a riparian owner cuts off the riparian rights even between the parties to the grant.[21] The reason given for this loss of the riparian right is that there is no preservation of access. If, however, the riparian right is "part and parcel of the land" itself, it is difficult to see why a failure to mention the riparian right in the conveyance should automatically cut off and destroy the right. Logically, what is a part and parcel of the land should go with the land whether specifically mentioned or not and the right of access would be inferred as a necessary incident to the enjoyment of this "part and parcel of the land."[22] It is held that where there are existing conditions such as ditches so situated as to indicate an intention to preserve the right, the right would not be cut off.[23]

The basic principle of the riparian doctrine as already noted is actual access to the stream and severance from the stream destroys the right.[24] If, nevertheless, the right is preserved as between the grantor and grantee on the grounds of estoppel only, the result reached by the court where third parties are concerned seems illogical.[25] The right must be preserved and upheld on some other grounds as against lower riparian owners. The court seems to be influenced by the fact that to recognize a con-

[18] It is true that the court cites the case of Strong v. Baldwin, supra, n. 16, as having previously decided this feature, but the facts of that case are so involved that it certainly does not clearly appear from the decision itself and without a careful examination of the record that this particular question was there presented and determined. Certainly the court in the Copeland case was not of the opinion that this question had been previously decided.

[19] William E. Colby, in reviewing Long on Irrigation, 6 California Law Review, 243.

[20] Hudson v. Dailey, supra, n. 11; Copeland v. Fairview etc. Co. supra, n. 16.

[21] Anaheim Water Co. v. Fuller, supra, n. 15.

[22] All incidental and appurtenant rights necessary for the reasonable enjoyment of the main grant are conveyed by implication. Cave v. Crafts (1878) 53 Cal. 135, 140; McShane v. Carter (1889) 80 Cal. 310, 22 Pac. 178; Willoughby v. Lawrence (1886) 116 Ill. 11, 4 N. E. 356; Jackson v. Trullinger (1881) 9 Ore. 393.

[23] Hudson v. Dailey, supra, n. 11.

[24] Id.

[25] See supra, n. 18.

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veyance as having the effect of destroying the right of the severed tract would be thereby to vest this same right in the lower riparian owners. This would virtually mean that the riparian owner, whenever he conveyed a non-abutting parcel, would in effect also be granting the riparian rights theretofore existing in such severed tract to lower riparian owners instead of to his actual grantee.

Another holding of the California court that cannot be reconciled with the actual access idea is that after the riparian land is once detached from actual access to the stream without express preservation of such right, it becomes non-riparian and ever remains so, even if the original riparian grantor later acquires the tract again.[26]

The decision of the court is opposed to the doctrine on this point as announced in other countries.[27] The principles developed in the civil law on this question seem much more logical, for it is there held that conveyance of a non-abutting parcel carved out of a riparian tract automatically severs the riparian right and any attempt to preserve the right is ineffectual. On the other hand, addition of a non-riparian tract to a riparian tract automatically confers riparian rights on the added parcel. The fundamental concept of actual access of physical contact with the flowing stream is thus preserved throughout and appeals to one as a more logical and consistent development of the law on the subject.

R. P.

WILLS: SATISFACTION OF A DEBT BY A LEGACY.—A California Court for the first time, in the case of *White v. Deering*,[1] has actually decided and discussed the question of the satisfaction of a debt by a legacy. While the court discusses the subject generally, the decision itself is limited to the point of a legacy to a servant. The Court, after quoting from a standard work the rule that "there is a general presumption that a legacy to a servant or creditor is to be considered as a satisfaction of a debt for wages unless there are circumstances that take the case out of the rule",[2] expressed its disagreement with this statement, and followed the rule expressed by Lord Eldon that "a legacy was never deemed a satisfaction for a legal demand when that demand was unliquidated at the time the legacy was given, nor where it was given before the time when the demand

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[26] Anaheim Water Co. v. Fuller, supra, n. 15; Strong v. Baldwin, supra, n. 16.

[27] Stockport Waterworks Co. v. Potter, supra, n. 5; Discussion of French and Spanish Law on this point in Wiel, Origin and Comparative Development of the Law of Watercourses in the common Law and in the Civil Law, 6 California Law Review, particularly pp. 356-7.

[1] (1918) 27 Cal. App. Dec. 476, 177 Pac. 516.

[2] Labatt, Master and Servant, § 690.

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accrued, or the debt contracted, unless it was expressly said in the will that it should be a satisfaction."[3]

Is Lord Eldon's rule really in conflict with the general rule as quoted from Labatt? Is it not rather a modification of the rule so given? The cases generally would seem to consider it a limitation merely.

In the case before the California Court the legacy was to a servant whose claim was unliquidated; that fact itself was sufficient to take the case out of the general rule, without considering the matter further. The New York case[4] cited by the court was also one in which the amount owing at the time the legacy was given was undetermined, and thus does not decide that a legacy to a servant whose debt has been liquidated would not be considered a satisfaction. Probably the reason why the Lord Chancellor, in the case of Richardson v. Greese,[5] said by way of dictum that "legacies to servants have never been held to be in satisfaction of debts" was that as a general rule the amount of wages owing to servants in England was rarely a determinate amount.

The discussion of the case by the District Court of Appeal suggests the question whether it would decide in the same way had the amount owing been a definite sum and had the legacy been equal to or greater than the debt. The Court's argument would seem to imply that it would so hold, for it speaks of the inclination toward bounty that would naturally exist in the mind of the benefactor where one had been in close contact with the testator through service. The case of Smith v. Furnish[6] might indicate that the Supreme Court would take a different view, though that case was one where the legacy was specifically given for the services and the Court held that the plaintiff had elected when she sued on the debt.

The remarks made by the District Court of Appeal, however, are in accord with the feeling expressed by many learned judges, when commenting on the rule, which they have often considered as a harsh one.[7] They have uniformly felt that it should be avoided wherever possible and therefore have looked for available excuses to escape its application. None, however, have gone so far as the *dictum* in this case, in attempting to get away from the strict rule. The existence of the general rule

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[3] La Sage v. Coussmaker (1794) 1 Esp. 188.
[4] Sheldon v. Sheldon (1892) 133 N. Y. 1, 30 N. E. 730.
[5] (1743) 3 Atk. 65, 69, 26 Eng. Rep. R. 840.
[6] (1886) 70 Cal. 424, 12 Pac. 392.
[7] Richardson v. Greese, supra, n. 5; Barclay v. Wainwright (1797) 3 Ves. Jun. 462, 30 Eng. Rep. R. 1106; Wallace v. Pomfret (1805) 11 Ves. Jun. 542, 32 Eng. Rep. R. 1199; Williams v. Strong (1815) 12 Mass. 391, 7 Am. Dec. 81; Eaton v. Benton (1842) 2 Hill (N. Y.) 576, 578; Rogers v. Hand (1884) 39 N. J. Eq. 270, 273; Mitchell v. McKee (1912) 157 Iowa 336, 346, 136 N. W. 1054.

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has always been recognized by them and they have acknowledged that only special circumstances could avoid it.

The idea of close relationship has not governed the judges in holding that, where there had been a pin-money settlement on a wife, which was in arrears at the time of a legacy given by the husband, there was a satisfaction by a provision in the will giving more than the amount due.[8] Nor did it have weight in a case where the husband had received separate property of the wife and had failed to pay it over before his death, but left a legacy greater than the sum owing.[9] In fact, in one case, where that ground was relied on by counsel, the court said, "there is no difference whether the debt is due to a stranger or to a child."[10]

The first case on the subject, which stated the general rule, was that of Talbot v. Duke of Shrewsbury,[11] which says that a legacy absolute and certain of a sum equal to or greater than the debt, is a satisfaction. This case has been followed by several others directly[12] and, impliedly, by those which have sought to find circumstances showing a different intention on the part of the testator.[13]

As already stated, the general rule is considered harsh and any one of the following circumstances has been deemed sufficient to take the case out of the strict rule: where the debt is unliquidated, as in the case decided by the California Court; where there is a provision in the will that the debts shall be paid;[14] where the debt was contracted after the legacy was given;[15] where the legacy is contingent;[16] where the debt is evidenced by a promissory note.[17]

E. B. C.

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[8] Fowler v. Fowler (1735) 3 P. Wms. 128, 24 Eng. Rep. R. 1098.

[9] Wesco's Appeal (1866) 52 Pa. State. 195.

[10] Fetrow v. Krause (1895) 61 Ill. App. 238, 245.

[11] (1714) Prec. in Chan. 394, 24 Eng. Rep. R. 177.

[12] Jeffs v. Wood (1723) 2 P. Wms. 128, 24 Eng. Rep. R. 668; Fowler v. Fowler, supra, n. 8; Gagnon v. Wood (1759) Note, 1 P. Wms. 411, 24 Eng. Rep. R. 450; Allen v. Merwin (1876) 121 Mass. 378; Adams v. Adams (1896) 55 N. J. Eq. 42, 35 Atl. 827; Chaplin v. Leapley (1905) 35 Ind. App. 511, 74 N. E. 546.

[13] Wallace v. Pomfret, supra, n. 7; Chancey's Case (1717) 1 P. Wms. 408, 24 Eng. Rep. R. 448; Nicholls v. Judson (1742) 2 Atk. 300, 26 Eng. Rep. R. 583; Reynolds v. Robinson (1880) 82 N. Y. 103, 57 Am. Rep. 555, 20 N. Y. Supp. 76; Thompson v. Wilson (1898) 82 Ill. App. 29, L. R. A. 1915 B, 1173, n.; Heisler v. Sharp (1888) 44 N. J. Eq. 167, 14 Atl. 624.

[14] Van Riper v. Van Riper's Ex'rs. (1838) 2 N. J. Eq. 1; Fetrow v. Krause (1895) 61 Ill. App. 238; Reynolds v. Robinson (1880) 82 N. Y. 103, 37 Am. R. 555, 20 N. Y. Supp. 76.

[15] Cranmer's Case, supra, n. 12; Heisler v. Sharp's Ex'rs. (1888) 44 N. J. Eq. 167, 14 Atl: 624; Glover v. Patten (1897) 165 U. S. 394, 17 Sup. Ct. Rep. 411, 41 L. Ed. 760.

[16] Lee v. Brown (1798) 4 Ves. Jun. 362, 31 Eng. Rep. R. 184; Tompson v. Wilson (1898) 82 Ill. App. 29.

[17] Carr v. Eastabrook (1797) 3 Ves. Jun. 561, 30 Eng. Rep. R. 1156.

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Book Reviews

A TREATISE ON FEDERAL TAXES. By Henry Campbell Black, LL.D. Fourth Edition (Including the Revenue Act of 1918). Verum Law Book Company, Kansas City, Mo., 1919. pp. xxxi, 704.

There have come to be distinctly different classes among the hundreds of hand books now published on the income tax and the other federal taxes. There were at first many intended as tax-payers' guides, written for laymen and "little business". The government spoiled the market for these by its income tax primer and other publications. Then there are the books by accountants for other accountants, written by experts for experts, books mainly for "big business." Now there are coming into prominence the law books written by lawyers for other lawyers. This is one of the last class.

The income tax law has so far not often been the basis of litigation. So far, it is probably safe to say, the chief difficulty has been to find out what the taxable income was, an accountant's rather than a lawyer's job. But the new statute brings many interpretations as well as fundamental changes into what was heretofore assumed to be the law. Now is the time when the lawyer comes into his own in this field and a rich field it is going to be.

The book before us is decidedly a law book. Although there are not yet more than fifty cases of any importance bearing on the new income tax law which have been decided since 1913, yet Dr. Black has found nearly one thousand cases which bear on his problems, and this long list includes very few of the older cases dealing merely with the fundamental principles of taxation generally. Thus not more than half a dozen of those included in Goodnow's case book are cited. In short, the thousand cases cited bear specifically on the recent taxes.

The book begins with a chapter on the nature, history, and legal basis of income taxes. Why so many text book writers consider it desirable to ornament their more serious work with such a chapter is a puzzle. Such a study must necessarily be too brief to be of any real value. In this field brevity inevitably leads to lack of clearness and even to error. Thus in the book before us (p. 7) it is stated that federal salaries were exempt under the Civil War income tax law of 1862 and taxable in 1864. This is an error. Such salaries were, in 1862, taxed at the source and hence not to be included in the "declaration". Somewhat the same line of criticism is applicable to the too brief

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chapter on the "constitutional validity of income tax laws" which gives an all too condensed, although accurate, summary of the points involved.

The chapter on "what constitutes taxable income" contains one of the best expositions yet put in print. Particularly important is the clear recognition that the fundamental concept is "realized *money* income" (33). Since the point has never come before the courts, being thus far always in favor of the taxpayer, the practice seemingly permissible of using inventories to determine gross income, is not discussed. It is certain, however, that when prices fall some taxpayer will take this into court. Then we shall know whether mere convenience of accounting is to be permitted to introduce a conflict of ideas. For, profit in the form of unsold goods on the shelves is not realized money income.

The chapter on Deductions and Credits is another admirable piece of work. One minor point in this chapter seems to be in error. It is said (p. 201) in comment on the now repealed provision of the law that losses not incurred in one's regular business are not deductible, that "the law and practice of England correspond rather closely with our own in this particular". The trouble is that while this provision may have been originally copied from the English law it never fitted into our law, because the underlying concepts of the two taxes are so different. The British law is a tax on income *per se,* ours is a tax on persons in proportion to their income. Hence in England the loss in question is regarded as deductible from the income in connection with which it was incurred, while with us all losses should be (and now are) deductible from the total income of the person, otherwise he could never be sure of the allowance. The point is not important now that the law is corrected.

Text books writers have this year had a hard time to get the new editions of their books to market in the short interval between the final passage of the new act late in February and the time for filing the first returns March 15th. Hence it would be unfair to criticise the book for any failure to interpret fully the new law.

The book before us contains the new law but, of necessity, not the new regulations, which have brought much relief at points where there would otherwise have been great suffering. Regulations 45 must be used to supplement the text before us.

The volume discusses all the present federal taxes except customs duties.

Carl C. Plehn.

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INTERNATIONAL LAW. By Berthold Singer. T. H. Flood & Co., Chicago, 1918. pp. xiii, 335.

The author states in the preface that "This book is especially prepared for our Army, Naval and Aviation Forces. It is a ready compendium for any question which may come up in their everyday's work with reference to International Law." It is sincerely to be hoped that not many of the men in our "Army, Naval and Aviation Forces" had occasion to consult this compendium; it is superficial, inaccurate, confused, and altogether lacking in proportion in the treatment of topics.

Edward Elliot.

THE MAN IN COURT. By Frederick De Witt Wells, Justice Municipal Court, New York City. G. P. Putnam's Sons, New York and London, 1917. pp. 283.

Bagehot said of Macaulay that he was interested in the people of India not for themselves but as materials for literary comment, a quality that he thought characteristic of the "literary mind." Judge Wells has not this fault—or merit, whichever it be. The value of his book consists in the fact that it is one of original entry, a record of impressions and observations made by a keen and wide-awake man, with a due sense of humor and of proportion. The author has made a useful contribution to the study of "law in action" as contrasted with "law in books". The book is written for the layman, but the lawyer who wants to know the sort of insight into legal machinery that laymen are getting through such writings as this had better spend an evening in reading Judge Wells' book. He will not only learn something of the layman's point of view, but will get some useful practical suggestions about conduct in court and the like.

Orrin K. McMurray.

Books Received

LAW AS A VOCATION, THE. By Frederick J. Allen. Harvard University Press, Cambridge, Mass., 1919. pp. viii, 83.

PUBLIC UTILITY RATE FIXING. By C. E. Grunsky. Technical Publishing Co., San Francisco, Cal. 1918. pp. 169.

CORPORATION MANUAL. Edited by John S. Parker, assisted by J. B. R. Smith. Corporation Manual Co., 65 Cedar St., New York City, N. Y. 20th ed. 1919. pp. xiii, 2225.

CONSTITUTIONAL POWER AND WORLD AFFAIRS. By George Sutherland. Columbia University Press, New York City, N. Y. 1919. pp. vii, 202.

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California Law Review

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The Relation Existing Between Irrigation Water Users and Distributing Companies With Special Reference to Right Arising Out of Contract

THE object of this paper is an analysis of the law as it exists in California today in reference to rights arising out of contracts made between water companies and irrigation users, with a brief historical outline of its development through decided cases and statutes. There have been many forces, most of them economic in their nature, molding the law of water distribution here in the west, where irrigation has played such an important part in the development of the State and is destined to increase in importance as capital is made aware of the profits to be gained from the conversion of arid deserts into luxuriant fields. The importance which has attached to irrigation has kept the legal questions involved constantly alive, so that few points have gone uncontested through the courts, and the pressure of interest has inevitably brought about careful consideration, modifications, legislation and the other things that constitute legal development.

References will be made to the law in other western states in so far as they may serve to elucidate and explain the present law in this State; for although California has undoubtedly been one of the leaders in establishing the water laws of the west, all the arid states have been confronted with the same problems and each has contributed its share of cases and statutes. Colorado, in particular, will be frequently referred to because of the contrast between many of the California rules and Colorado principles derived from that state's adherence to the appropriation doctrine exclusively.

The expression "distributing companies" as used in this title will be confined to the designation of those companies

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which furnish water to the public generally, for pecuniary remuneration to the stockholders or owners of the plant and system. No consideration will be given to the problems which arise from the operation or dealings of mutual companies, organized primarily for the purpose of supplying their members with water, or of irrigation district projects, fostered by state or federal governments, and in their nature mutual rather than public service companies.

As a further limitation of the subject to be discussed, not all phases of contractual rights between the company and the irrigator will be considered, although an attempt will be made to mention most of the common legal questions which the cases have raised. As a basis the following four phases of contractual rights will be dealt with: (1) their status in general as affected by the obligations of the companies as public service companies and the public character of appropriated water in this state; (2) contract rate fixing in its relation to public rate fixing; (3) the status of so-called "easements" or "water rights" sought to be established by contract; (4) discrimination among users with special reference to priorities of use.

In conclusion an attempt will be made to summarize the legal situation and compare it with the practical needs of the state. Here the general problems will be considered briefly upon economic and sociological grounds and a conclusion drawn as to the justification of our law on the topics discussed.

I.

That the distributing company is a public service company would probably not be questioned today, but since that proposition is so basic in theory and must be fully appreciated to understand the development of this discussion, it deserves more than passing comment. Among the many cases which announce the test for determining whether or not a company is subject to the restrictions of public service law, Munn v. Illinois[1] is a well known authority to the effect that where one devotes his property to a public use, "he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created—so long as he maintains the use." This is the common law, and it would seem that it alone would be sufficient to

[1] (1877) 94 U. S. 113, 24 L. Ed. 77.

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bring distributing companies under the laws governing public service.

The early legislative enactments recognized the public nature of water companies. Thus, in the Act of 1852[2] "to provide for the incorporation of water companies", there was a clause insuring to cities the right to regulate rates. Similarly, in the Act of 1858[3] and its amendment in 1861,[4] it was provided that rates should be fixed by commissioners.

In 1879, the constitution not only recognized the proposition, but crystallized it against the facility of alteration by the state legislature in the following words: "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law;"[5] "The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by the authority of and in the manner prescribed by law."[6]

The definite language of the constitution is found reiterated in subsequent statutes. The Act of March 26, 1880,[7] is entitled "An act authorizing the board of supervisors of the counties in which water is sold for the purposes of irrigation, to fix the rates at which water shall be sold." In the following year an act[8] was passed to enable boards of supervisors, town councils and the like to obtain data and information from water companies, and to perform the duties imposed upon them by the constitution. The Act of March 12, 1885,[9] is unequivocal in its purpose, namely: "An act to regulate and control the sale, rental and distribution of appropriated water in this state, other than in any city, city and county, or town therein, and to secure the rights of way for the conveyance of such water to the places of use."

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[2] Cal. Stats. 1850-1853, p. 898.
[3] Cal. Stats. 1858, p. 218.
[4] Cal. Stats. 1861, p. 228; and the Act of 1872, Cal. Stats. 1871-72, p. 945, although providing for the formation of mutual companies, indicates the same feeling in the Legislature by providing that such companies should be governed by trustees.
[5] Cal. Const. Art. XIV, §1.
[6] Cal. Const. Art. XIV, § 2.
[7] Cal. Stats. 1880, p. 16.
[8] Act of March 7, 1881, Cal. Stats. 1881, p. 54.
[9] Cal. Stats. 1885, p. 95.

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Up to this time the tendency had been all in one direction,—toward rigid public regulation. The Act of 1885 was amended by the addition of section 11½ on March 2, 1897,[10] as follows: "Nothing in this act contained shall be construed to prohibit or invalidate any contract already made or which shall hereafter be made, by or with any of the persons, companies, associations or corporations described in section 2 of this act, relating to the sale, rental, or distribution of water or to the sale or rental of easements and servitudes of the right to the flow and use of water, nor to prohibit or interfere with the vesting of rights under any such contract." If this enactment is to be construed literally, it undoubtedly represents a decided change in attitude toward water companies, for so considered, it purports to validate all contracts, and these contracts in so far as they dealt with rates would be in direct conflict, in many instances, with the public fixing of rates,—a matter which will be discussed at greater length below. At least the act signifies a reactionary tendency. The further amendment of February 28, 1901[11] shows a similar tendency in so far as it requires boards of supervisors in fixing rates, to designate what proportion of the rates so fixed shall be for expenses and what proportion for profits. In the same direction is the Act of March 16, 1901,[12] entitled: "an act declaring upon what terms contracts between persons, companies, associations, or corporations, furnishing water for irrigation to the consumers of such water shall be valid and to provide that such contracts shall be deemed based upon sufficient consideration." This law provides that contracts with companies shall be valid, "any law or rule to the contrary notwithstanding", specifically protecting contracts made prior to the fixing of rates, but forbidding the making of contracts providing for a rate greater than the publicly fixed rate.

An amendment to the State Constitution in 1911[13] gave to the Railroad Commission power to regulate and fix rates for water companies. Mention will be made of the activities of this Commission below.

On August 10, 1915,[14] the Legislature passed "an act to

[10] Cal. Stats. 1897, p. 49.
[11] Cal. Stats. 1901, p. 80.
[12] Cal.. Stats. 1901, p. 331.
[13] Cal. Const. Art. XII, § 23.
[14] Cal. Stats. 1915, p. 1420.

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require water companies to properly and adequately serve with water the inhabitants of the territory for the service of which they have a franchise." The tone of this act sounds like a reversion toward the stricter view of public service.

Summarizing the legislation in this state, it appears that the tendency toward public control was present in the first legislation on the subject and grew in force till 1879 when the constitution fixed not only the principle but laid down definite rules governing the furnishing of water in cities. The force of this movement to restrict and limit the powers of the water companies continued unabated through the legislation of 1881 and 1885. During the next twenty-five years a reaction set in, evincing a more liberal policy toward the distributors, which culminated in legislation, whose language, at least, is hard to reconcile with the provisions of the constitution. At the present time (1916) indications are not wanting that a tendency toward stricter control is setting in.[15] The legislation has been inconsistent and characterized by unmistakable waves of public opinion; but an attempt, at least, has been made by the legislature to meet the demands of the state as they have arisen; and the conflicting acts, in so far as they were inspired by hard judicial decisions, have done their part in developing the law, with the compensation of legislative flexibility.

Turning now to the cases, it is not surprising to find them in some confusion. This might be expected from the inconsistency of the statutes; but they alone are not entirely responsible. The degree to which the contracts of water companies have been subjected to the laws of public service has varied considerably.

II.

Starting with the proposition established above, that water companies in this state have been uniformly regarded as public service companies, it follows that they are bound to serve all

[15] See the holdings of the Railroad Commission as to rates, rules and regulations, Application of Ventura County Water Co. (1914) 4 Cal. R. R. Com'n Dec. 686, where it is said in the headnote: "the Commission has the power of supervision over rates irrespective of any contract entered into between the consumers and the utility." See also Application of Tujunga Water and Power Co. (1915) 7 Cal. R. R. Com'n Dec. 580, where the right of the Commission to alter water contracts is broadly asserted. In fact, it is probably not extravagant to say that the attitude of the Railroad Commission suggests the abolition of contracts and the substitution therefor of water service under terms to be prescribed by the Commission.

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those who apply,[16] to the extent of their distributing systems. This is simply the fundamental principle of compulsory service in the law of public service, but the question arises: being thus bound to serve the members of the public, can there be any consideration for contracts by which the company agrees to serve the consumers with water,—in other words, can any of the service contracts be valid?

Two early cases[17] were decided in such a way that the power of the company to obtain rights by contracts made with the consumers, must have been assumed to exist although the question was not directly presented. In 1900 the Supreme Court was called upon to decide a case[18] in which the plaintiff company sought to enforce a service contract against the defendant whose claim was that his general demurrer should be sustained because the constitution (Article 14, sections 1 and 2) having declared that appropriated water was subject to a public use, and having subjected it to regulation and control by the state in the manner prescribed by law, failure to mention such a law in justification of the contract, prevented the complaint from stating a cause of action. The Supreme Court gave judgment for the plaintiff on the grounds that it could not be supposed that the constitution and legislature intended to confiscate the property of water companies, no provision existing between 1879 and 1880 for the fixing of rates outside of cities. This case has been characterized by Mr. Wiel as "the leader in recognizing no restrictions upon the validity of contract."[19]

Later in the same year (1900) however, the Supreme Court, in the case of Crow v. San Joaquin and Kings River Canal and Irrigation Company,[20] held definitely against the company's right to contract on the grounds that since the company was bound by the constitution, Article 14, section 1, and the Act of March 12, 1885 to supply water to all who made tender of reasonable price, there was no consideration for a contract

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[16] Price v. Riverside Land and Irrigating Co. (1880) 56 Cal. 431; McCrary v. Beaudry (1885) 67 Cal. 120, 7 Pac. 264.

[17] Fresno Canal & Irrigation Co. v. Rowell (1889) 80 Cal. 114, 22 Pac. 53, 13 Am. St. Rep. 112; Fresno Canal & Irrigation Co. v. Dunbar (1889) 80 Cal. 530, 22 Pac. 275.

[18] Fresno Canal & Irrigation Co. v. Park (1900) 129 Cal. 437, 62 Pac. 87.

[19] Wiel's "Water Rights in the Western States", 3d ed. (1911) Vol. II, p. 1212.

[20] (1900) 130 Cal. 309, 62 Pac. 562.

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by which plaintiff agreed to pay arrears before seeking further service. But the case was not followed in Stanislaus Water Company v. Bachman (1908),[21] which adopted the view of the Park case.[22]

Meanwhile the federal courts in California had consistently ruled against the validity of service contracts from 1896 to 1899,[23] save in the case of San Diego Flume Company v. Souther,[24] where the company's right to contract was recognized. This case came up for a rehearing[25] in 1900, and was affirmed, the court citing Fresno Canal and Irrigation Company v. Park[26] with approval, and interpreting the words, "by authority of law" as used in the constitution[27] with reference to collection of tolls for water service, as meaning, 'by authority of the general law of the land'. Referring to the syllabus in the official report of Osborne v. San Diego Land and Town Company,[28] the following expression was characterized as misleading: "The appropriation of water in California is a public use, and the right to collect tolls or compensation for it is a franchise, subject to regulation and control in the manner prescribed by law, and such tolls cannot be fixed by contract of the parties." The case was tried for a third time in 1900,[29] and the same decision reached, again based upon the Park case.

Judge Ross explained the holdings of the Circuit Court as follows: in San Diego Land and Town Company v. City of National City[30] and other cases through and including Mandell v. San Diego Land and Town Company,[31] the Circuit Court was of opinion that the question had never been decided by the Supreme Court of California. It therefore had held that the water appropriated under the constitution of California and statutes passed in pursuance thereof, for sale, rental or distribu-

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[21] (1908) 152 Cal. 716, 93 Pac. 858, 15 L. R. A. (N. S.) 359.
[22] Supra, n. 18.
[23] San Diego Land & Town Co. v. City of National City (1896) 74 Fed. 79; Lanning v. Osborne (1896) 76 Fed. 319; Mandell v. San Diego Land & Town Co. (1898) 89 Fed. 295; San Diego Land & Town Co. v. Sharp (1899) 97 Fed. 394, 38 C. C. A. 220.
[24] (1898) 90 Fed. 164, 32 C. C. A. 548.
[25] (1900) 104 Fed. 706, 44 C. C. A. 143.
[26] Supra, n. 18.
[27] Supra, n. 6.
[28] (1900) 178 U. S. 22.
[29] (1901) 112 Fed. 228; San Diego Land & Town Co. v. Jasper (1903) 189 U. S. 439, 48 L. Ed. 892, is in accord.
[30] Supra, n. 23.
[31] Supra, n. 23.

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tion, was charged with a public use; that where a corporation appropriates and furnishes water for such purposes, the rates must be established in pursuance of law; that no attempt to fix them by private contract with consumers will have any validity; and that so long as a sufficient supply exists, every person within the flow of the system has the legal right to the use of a reasonable amount of water in a reasonable manner upon paying the legal rate fixed for supplying it.

In this condition stood the decisions when in 1909 the case of Leavitt v. Lassen Irrigation Company[32] was presented to the Supreme Court. Here the plaintiff, who had sold a distributing system and reserved a perpetual water right to certain land, demanded damages of defendant for refusing to supply water without cost, relying upon this reservation and another perpetual water right which he had bought from an intervening owner of the system. The court gave judgment for the defendant and explained its attitude as follows:

> "The fundamental and all important proposition then is this, that a public service company which is appropriating water under the constitution of 1879, for purposes of rental, distribution and sale, cannot confer upon a consumer any preferential right to the use of any part of its water . . . . It does not follow that a water company may not make specific contracts with individual consumers which are within the purview of the constitution and within valid legislative enactments regulating the public use. This is precisely as decided by Fresno Canal and Irrigation Company v. Park. But as decided in Crow v. San Joaquin and Kings River Canal and Irrigation Company, immediately following the Park case, such a contract, even if violated by the consumer, could not operate to deprive him of his constitutional right to water furnished by the public service corporation upon tender to it of the legal rate. For the breach of the consumer's contract, the water company must seek other redress than that of depriving the consumer of his share of the supply."

Whatever may be thought of this attempt to reconcile the Park case[33] and Crow v. San Joaquin Company,[34] it is obvious that the Lassen case[35] establishes a middle ground be-

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[32] (1909) 157 Cal. 82, 106 Pac. 404, 29 L. R. A. (N. S.) 213.
[33] Supra, n. 18.
[34] Supra, n. 20.
[35] Fresno Canal & Irrigation Co. v. Perrin (1915) 170 Cal. 411, 149 Pac. 805.

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tween the extremes represented by the previous cases. The holding seems sound on principle, satisfactory in its application to practical cases, and it is the present law on the subject in this state.

Nearly all the other western states have constitutional provisions similar to those of California, specifically declaring the service of water a public use; and the cases have in general shown a disposition to respect these provisions. Thus it is said in a Washington case, "since the obligations of a private corporation organized to sell lands and furnish water for their irrigation, are quasi public, such corporations cannot impose arbitrary restrictions upon the supply of water under the guise of regulations."[36] The principle is far reaching; cities engaged in supplying their inhabitants with water do so, not in their sovereign capacity, but as private corporations, subject to compulsory service and public regulation;[37] a mutual company distributing its excess supply to others than its members becomes a public service corporation as to the excess.[38] Other cases which announce the public burdens of water companies in one form or another are numerous; among the more recent may be mentioned Toyah Valley Irrigation Company v. Winton,[39] City and County of Denver v. Brown,[40] Northern Colorado Irrigation Company v. Pouppirt,[41] Cleveland v. Malden Water Works Company,[42] Childs v. Neitzel,[43] Brose v. Board of Directors of Nampa and Meridian Irrigation District (two cases).[44] On the other hand the cases are equally numerous which hold or reiterate the proposition that the company may make valid contracts; in fact many of the cases stand for both principles,[45] in

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[36] Shafford v. White Bluffs Land & Irrigation Co. (1911) 63 Wash. 10, 114 Pac. 883.

[37] City of Houston v. Lockwood Investment Co. (1912) 144 S. W. 685 (Tex.); Feil v. City of Coeur d'Alene (1913) 23 Idaho 32, 129 Pac. 643. This is true in California also; see Nourse v. City of Los Angeles (1914) 25 Cal. App. 384, 143 Pac. 801; but see Marin Water Power Co. v. Town of Sausalito (1914) 168 Cal. 587, 143 Pac. 767.

[38] Baker City Mutual Irrigation Co. v. Baker City (1911) 58 Ore. 306, 113 Pac. 9.

[39] (1915) 174 S. W. 677, (Tex).

[40] (1914) 56 Colo. 216, 138 Pac. 44.

[41] (1912) 22 Colo. App. 563, 127 Pac. 125.

[42] (1912) 69 Wash. 541, 125 Pac. 769.

[43] (1914) 26 Idaho 116, 141 Pac. 77.

[44] (1911) 20 Idaho 281, 118 Pac. 504; (1913) 24 Idaho 116, 132 Pac. 799.

[45] Fenton v. Tri-State Land Co. (1911) 89 Neb. 479, 131 N. W. 1038; City & County of Denver v. Brown, supra, n. 40; Childs v. Neitzel,

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effect adopting the view of Leavitt v. Lassen Irrigation Company.[46] In the case of City of Houston v. Lockwood Investment Company,[47] the following general statement is made: "Where a franchise under which a public utility company operates, imposes a burden on the company, any rule or regulation adopted by the company, by which it attempts to shift the burden upon the consumer, is unreasonable and unjust and will not be enforced."

The key note of the solution of the problem raised by compulsory service on the one side and the freedom of contract on the other has been reasonableness. All the western states have been confronted with the same general conditions and have arrived at the same general conclusions. All at least have recognized that a technical and rigid application of the principle that no consideration for a contract can arise from the agreement to perform a duty to which one is already bound, would not only be impracticable, but would result in positive injustice. This test of reasonableness was in some instances slow in finding expression, while in others it has been adopted so suddenly as to confuse the law and give to it a quality of uncertainty, ill calculated to receive the approval of those whose rights were thus made to appear unstable. Yet the results have in the main been satisfactory. The modifications and adjustments that practical phases of the question have made necessary, have come about not by legislative enactments alone, but by judicial wisdom as well, broad enough in its conception of duty to depart, where occasion demanded, from the academic principles of laws wrought from different sets of facts and applicable in their exactness to other circumstances. The fundamental rule of contract law that one cannot validly contract to do that which he is already bound to do has not been violated. The consumer still receives service by virtue of his status as a member of the public, and not on account of the contract, and the rate he pays gets its validity from an act of the public board and not the contract. On the other hand, the company is entitled to a just compensation for its outlay. Its right to contract is as sacred as that of any

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supra, n. 43; American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co. (1913) 155 S. W. 286 (Tex.); Pasco Reclamation Co. v. Rankert (1913) 73 Wash. 363, 131 Pac. 1143.

[46] Supra, n. 32.

[47] Supra, n. 37; see also State ex rel. De Burg v. Water Supply Co. of Albuquerque (1914) 19 N. M. 36, 140 Pac. 1059.

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individual. To say that it has certain disabilities because of the peculiar nature of its occupation does not justify the conclusion that it is totally disabled and therefore at the mercy of a public, which experience has shown cannot be impartial for the very good reason that its own interests are at stake. The concept of consideration in the law of contracts is of no more dignity than the principle that one cannot act upon both sides of a bargain. So the reasonable result has been reached that the company may contract subject to its particular disabilities; and the conclusion is justified on principle by public policy, which in the last analysis is no more than public reasonableness.

III.

Having seen that the company may make valid contracts with consumers provided they are reasonable and not discriminatory, an interesting question arises as to the relation of the rates stipulated in these contracts to rates fixed in accordance with the constitution of 1879. The terms of the constitution provided a specific method for the establishment of rates in cities, declared all water then appropriated or thereafter appropriated to be subject to a public use, but left the details of rate fixing outside cities to subsequent legislation, "in the manner to be prescribed by law."[48]

Was the effect of this constitutional provision to burden all subsequently made contracts with a paramount right of the legislature to carry out the constitutional authorization, and invalidate contractual rights? In 1896 the federal court gave an affirmative answer to the question in these words: "As the water in question from the moment the appropriation became effective, became charged with a public use, it was not in the power of either the corporation making the appropriation or of the consumers to make any contract or representation that would at all take away or abridge the power of the state to fix or regulate the rates."[49] In Los Angeles City Water Company v. City of Los Angeles[50] (1898), Mandell v. San Diego Land & Town Company[51] (1898) and San Diego Land & Town Com-

[48] Cal. Const. supra, n. 5. The amendment of § 23, Article XII, providing for the fixing of rates by the Railroad Commission instead of by county boards of supervisors does not affect the question of validity of contracts, but simply provides a different method of fixing rates.

[49] Lanning v. Osborne, supra, n. 23.

[50] (1898) 88 Fed. 720.

[51] Supra, n. 23.

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pany v. Jasper[52] (1903), the federal courts adhered to the same doctrine. In the last case mentioned it is true, the decision was upon a contract made after the fixing of the public rate and the holding is qualified to the extent that the fixed rate must be such that it shall not deny just compensation to the company for the use of its property.

On the other hand a negative answer is to be found, not only in cases decided by the Supreme Court of California, such as Stanislaus Water Company v. Bachman,[53] but also in a later decision of a federal court, Souther v. San Diego Flume Company[54] (1901), holding that contracts between water companies and consumers were not per se invalid, and that the validity of the rates which they set are not impaired by subsequent action of the boards of supervisors of the county, taken under the statute, fixing the rates to be charged.

An argument in favor of an affirmative answer, which does not seem to have been much used in the cases, but which nevertheless, seems sound, is that if the contract rate were allowed to prevail over the fixed rate, then in every case where the rates differed there would be a situation of discrimination irreconcilable with the law of public service. There is perhaps an intimation of this view in Leavitt v. Lassen Irrigation Company.[55] On the other hand the theory which comes into conflict with this is that since contract rates may be valid in the absence of public fixing, the contract rights thus acquired by the parties cannot be impaired by subsequent legislation fixing the rates to be charged,[56] and since this is a guarantee of the federal constitution,[57] it is controlling.

Mr. Wiel, writing in 1911, says[58] with reference to this question: "The matter has usually been treated as an open question, though it may possibly be that the public rate displaces previous contract rates, as well as later ones." Since that date the question has not been specifically passed upon in California.

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[52] (1901) 110 Fed. 702, affirmed in (1903) 189 U. S. 439.

[53] Supra, n. 21, containing a statement that: "under the present statute, the contract rates prevail in all cases, the boards of supervisors being powerless to affect or interfere with them."

[54] Supra, n. 29.

[55] Supra, n. 32.

[56] Supra, n. 50.

[57] U. S. Const. Article I, § 10, subd. 1.

[58] Wiel, Water Rights in the Western States, 3d ed. (1911) Vol. II, p. 1222.

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In two cases which have involved the public rate, one held that the Railroad Commission could not be compelled to make and enforce regulations as to water service by companies at the instance of one not interested in the service.[59] The other decided that a company cannot collect more than the established rates and that mandamus will lie to compel the furnishing of water under such rate.[60]

On principle it looks pretty clear that the public rate should prevail. The argument founded upon the impairment of contracts is no stronger than its weakest link. In a sense it assumes as a fact the very question to be proved, namely that the contract rights acquired in the absence of public rate fixing were acquired absolutely, and free from the possibility of divestment authorized by the state constitution.[61] On the one hand, there is the broad principle that public interests must supersede private enterprise, where the two come in conflict. Section 3513 of the Civil Code of California recognizes this. On the other hand, the individual has certain fundamental rights, such as those of property and freedom of contract, that cannot arbitrarily be violated, even by public necessity. If, however, the individual is giving notice of the public necessity, or the possibility of future public necessity, in time to choose between taking a right so burdened and one less encumbered, in reason he should not be heard to complain of his own choice.

That public interests generally would be better served by regarding the public rate (unless unreasonable) as controlling in every instance does not require great argument. In California the difference between the value of the land properly irrigated and its value without water is usually a large part of the price of the land. The necessity for water is tremendous and always commensurate with the opportunity for hard dealing, so that the company has the advantage as against the individual irrigator. The only certain way to insure his protection against high rates is to allow the public, of which he is a member, to fix those rates. On the other hand, the company, which is also

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[59] Palmer v. Railroad Commission of the State of California (1914) 167 Cal. 163, 138 Pac. 997.

[60] Hatfield v. Peoples Water Company (1914) 25 Cal. App. 711, 145 Pac. 164.

[61] In Boise City Irrigation & Land Co. v. Turner (1905) 176 Fed. 373, the constitutional authorization was considered as taking effect as of date of the subsequent legislation enacted thereunder.

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a member of the public, is not imposed upon, inasmuch as the fixed rate must be reasonable and not confiscatory in order to be valid. This being the situation there appears to be no theoretical hardship either upon the distributor or the consumer in substituting for their temporary agreement a reasonable rate, for such rate cannot be reasonable as to one and unreasonable as to the other. And although the practical tendency at the present time is an increasing public distrust of corporations, which may at times be reflected in publicly fixed water rates, nevertheless there should be no danger in such an attitude if the courts perform their proper function in justly interpreting "reasonable", when they are called upon to do so.

Among the other western states, Colorado[62] and Arizona[63] hold to the doctrine that the public rate prevails, while in Washington there is a statute[64] declaring that the public service commission shall have no power to affect contract rates. In Idaho the earlier tendency in favor of the public rate was approved on the rehearing of a case,[65] in which the first decision favored the contract rate[66] to the extent that "an act of the legislature which provides that the annual maintenance charge for the use of water sold, rented or distributed may be fixed by contract is fully authorized by the constitution, section 6, article 15."[67] On the second trial the court held that the contract rate was valid and enforceable until a public rate was fixed. After that, however, it was void, being superseded by the fixed rate, legislative authority for which had existed, although not exercised at the time the contract was made.

In California, statutory enactments, presumably intended to remedy the uncertainty, have served rather to confuse the law than to settle it. The early acts of 1852,[68] of 1858[69] with the amendment of 1861,[70] and of 1872,[71] either provided for public

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[62] South Boulder & Rock Creek Ditch Co. v. Marfell (1890) 15 Colo. 302, 25 Pac. 504; No. Colo. Irrigation Co. v. Pouppirt, supra, n. 41.

[63] Gould v. Maricopa Canal Co. (1904) 8 Ariz. 429, 76 Pac. 598.

[64] Wash. Stats. 1911, c. 117, § 34; see also Cleveland v. Malden Waterworks Co. (1912) 69 Wash. 541, 125 Pac. 769.

[65] Boise City Irrigation & Land Co. v. Clark (1904) 131 Fed. 415, 65 C. C. A. 399; Boise City Irrigation & Land Co. v. Turner, supra, n. 61.

[66] City of Pocatello v. Murray (1909) 173 Fed. 382.

[67] Jackson v. Indian Creek Reservoir Ditch & Irrigation Co. (1909) 16 Idaho 430, 101 Pac. 814; (1910) 18 Idaho 513, 110 Pac. 251.

[68] Supra, n. 2.

[69] Supra, n. 3.

[70] Supra, n. 4.

[71] Cal. Stats. 1871-72, p. 945.

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rate fixing or showed a tendency in that direction. The constitution of 1879[72] definitely provided for public rate fixing in cities, after declaring the use of all water appropriated or thereafter to be appropriated for sale, rental or distribution to be a public use. The act of 1880[73] carried out the constitutional provision as to counties by providing for the fixing of rates by county boards of supervisors; and provided further for the forfeiture of the franchise of any company collecting a rate higher than that so fixed; but was silent as to contracts already made. In 1885 a similar act was passed[74] which was more detailed in its provision concerning public rate fixing and forfeiture. In 1897 this act was amended by the addition of section 11½:[75]

> "Nothing in this act contained shall be construed to prohibit or invalidate any contract already made, or which shall hereafter be made by or with any of the persons, companies, associations, or corporations described in section 2 of this act, relating to sale, rental, or distribution of water, or to the sale or rental of easements and servitudes of the right to the flow and use of water; nor to prohibit or interfere with the vesting of rights under any such contract."

This amendment shows a decidedly reactionary tendency. Interpreted literally it apparently purports to make the contract rate controlling where it comes in conflict with the rate fixed by the act of 1885. If this were true, companies could make valid contracts which would free them from the burdens of public service and thus the amendment would be contrary to the constitution and could not stand. This suggestion is made in the case of Leavitt v. Lassen Irrigation Company.[76] A similar tendency is apparent in the conflicting provisions of the act of 1901,[77] which declared in section 1 that such contract should be valid to all intents and purposes, subject to the restrictions thereinafter mentioned, "any law or rule to the contrary notwithstanding". Section 2 recited as a restriction the prohibition against rates exceeding those fixed by public boards or fixed by the companies "as provided by law". Section 4 read as follows: "Nothing in this act contained shall affect any contract

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[72] Supra, n. 5, 6.
[73] Supra, n. 7.
[74] Supra, n. 9.
[75] Supra, n. 10.
[76] Supra, n. 32.
[77] Supra, n. 12.

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made prior to the time that the board of supervisors fix and establish the rates and regulations under which water shall be sold and supplied."

It is difficult to say what the net result of these statutes has been. Considered in relation to the decided cases, they probably go to the extent of validating contract rates agreed upon before any action by the public boards, but in so far as they attempt to authorize contracts fixing rates after public rates have been declared, they are unconstitutional and of no effect.

In a summary of the present law of California governing conflicts between public and private rates, the following statements may be made: (1) If the contract is unreasonable or discriminatory, it cannot bind regardless of public rate fixing. (2) If the contract is reasonable and is not discriminatory and stipulates a rate, there is no doubt that it binds until a public rate is fixed. (3) After the public rate is fixed the contract rate continues to prevail if the public rate is unreasonable and therefore unconstitutional,[78] but if the publicly fixed rate is reasonable, then the mooted point is squarely raised, without regard to whether the public rate is higher or lower than the contract rate sought to be enforced or evaded.

In support of the contract rate there is section 552 of the Civil Code which authorizes the sale of perpetual water rights by water companies "at such rates and terms as may be established by said corporation in pursuance of law"; also the acts of 1885[79] and 1897,[80] and the act of 1901.[81] And there is further the argument that a public rate, purporting to change a contract rate would be unconstitutional as impairing the right of contract. Finally, there is the authority of the cases mentioned above.[82]

In support of the publicly fixed rate the following may be offered: (1) All contracts are made subject to the constitutional provision anticipating legislation, and must yield when this authority is exercised, as provided in section 3513 of the California Civil Code. The legislative acts of 1897[83] and 1901[84]

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[78] San Diego Land & Town Co. v. Jasper, supra, n. 52.
[79] Supra, n. 9.
[80] Supra, n. 10.
[81] Supra, n. 12.
[82] Lanning v. Osborne, supra, n. 23; Los Angeles City Water Co. v. City of Los Angeles, supra, n. 50; Mandell v. San Diego Land & Town Co., supra, n. 23.
[83] Supra, n.10.
[84] Supra, n. 12.

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are therefore unconstitutional in so far as they attempt to restrict the operation of the publicly fixed rate. (2) The expression "in pursuance of law" as used in section 552 of the Civil Code means the law of the constitution. (3) The cases mentioned above.[85]

Finally, there seems to be no doubt that a contract made subsequent to the fixing of a reasonable rate by the public board is subject to the public rate.[86]

Kenneth L. Blanchard.

(TO BE CONTINUED)

Berkeley, California.

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[85] Stanislaus Water Co. v. Bachman, supra, n. 21; Souther v. San Diego Flume Co., supra, n. 29.

[86] San Diego Land & Town Co. v. Jasper, supra, n. 52.

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Duty of a Railway Company to Care for a Person It Has Without Fault Rendered Helpless

SUPPOSE a passenger, an employee, or a trespasser is injured by a railway train, under such circumstances that the company is not liable for the injury. Suppose further that he is so injured as to be unable to take care of himself and that if he does not receive immediate assistance death or severe permanent injury will result. Is the railway company liable if it neglects to give him the needed assistance? Is it liable if it undertakes to care for him, but does so negligently? If it is liable, is the doctrine peculiar to railways, or is anybody who without fault renders another helpless, liable for failure to minister to his immediate needs? It is the purpose of this article to attempt to answer these three questions.

I.

We will first consider whether the railway company is liable in the case of a passenger. That the company is liable if it negligently cares for a passenger injured without its fault goes without saying, because the company is not acting the good Samaritan when it cares for a passenger; it is merely fulfilling a duty growing out of the relation of passenger and carrier.[1] That relation requires the railway company to remove an unattended sick or injured passenger and turn him over to somebody who can care for him.[2] The company fails to fulfill that duty whether it neglects to remove the passenger or removes him negligently.

Yazoo & U. V. R. Co. v. Byrd[3] is a suit by a passenger who fell off a train through his own negligence. The railway left him lying near the track for more than three hours, when it could easily have taken him to a doctor at the next station. In affirming judgment for the plaintiff the court said:

> "It matters not how negligent a passenger may have been in producing the injury for which he sues, it does not absolve the railroad from the duty which it owes to him of

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[1] 10 C. J. 978, and cases there cited.
[2] 10 C. J. 900 and cases there cited.
[3] (1906) 89 Miss. 308, 42 So. 286.

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> proper attention after an accident shall have occurred, and if, when injured, the railroad company neglects this care, which common humanity would dictate, and by reason of the neglect, after the injury has occurred, a passenger suffers damage, he may recover against the railroad company for its dereliction."

The doctrine that the railway company is liable for failing to care for a passenger injured without its fault is, of course, peculiar to common carriers, for it is dependent upon the relation of carrier and passenger. But there are other relations somewhat similar to that of carrier and passenger to which the duty might be extended; for example, that of innkeeper and guest. In Scholl v. Belcher[4] it was held to be the duty of an innkeeper to aid a guest who had been injured without his fault and was in a position requiring immediate attention, provided the innkeeper knew of the guest's need of assistance.

II.

We come next to the case of employees. A railway company is under the duty of furnishing emergency assistance to an injured employee,[5] just as it is to an injured passenger. Because of the nature of the employment, the relation of employer and employee gives rise to this duty. Employment on a railway is not only hazardous, but it is migratory. The employee is likely to be injured not in his home town, where he has relatives, friends and credit, but far away, where if the railway employees do not care for him, he will die for lack of care. As stated in Cushman v. Cloverland Coal & Mining Company:[6]

> "The dictates of humanity cast upon the employer, as the one nearest in obligation, the duty to provide, during the continuance of the emergency, whatever is immediately and urgently required for the preservation of life and limb.

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[4] (1912) 63 Ore. 310, 127 Pac. 968.

[5] Troutman's Adm'x. v. Louisville & N. R. Co., (1918) 179 Ky. 145. 200 S. W. 488; Tippecanoe Loan & Trust Co. v. Cleveland etc. Ry. Co. (1914) 57 Ind. App. 644, 104 N. E. 866, *dictum;* Slater v. Ill. Cent. R. Co., (1919) 209 Fed. 480; Ohio & Miss. R. Co. v. Early, (1895) 141 Ind. 73, 40 N. E. 257. See also the following cases holding that the highest employee on the spot has authority to hire a doctor to give emergency aid to an injured employee: Chicago & A. R. R. v. Davis (1900) 94 Ill. App. 54; Terre Haute & Ind. R. Co. v. McMurray (1884) 98 Ind. 358, 49 Am. Rep. 752; Louisville, N. A. & Co. Ry. Co. v. Smith (1889) 121 Ind. 353, 22 N. E. 775; Southern Ry. Co. v. Brister (1901) 79 Miss. 761, 31 So. 440; Adams v. Southern Ry. Co. (1899) 125 N. C. 565, 34 S. E. 642, 4 L. R. A. (N. S.) 63, and cases there cited.

[6] (1908) 170 Ind. 402, 84 N. E. 759.

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> Someone must serve the helpless man and the law devolves the duty upon the master rather than upon a stranger."

Or, as reasoned in Troutman's Ad'mx. v. Louisville & N. R. Co.:[7]

> "The courts have also found much difficulty in settling on a ground on which to rest the liability of the master in cases like this where there is no contract or statute imposing the duty of taking care of an injured servant. We think, however, it may well be put upon the ground that, as it would be a cruel and inhumane act to leave a helpless servant injured in the course of his employment to suffer or die from want of care and attention there is an obligation growing out of the relation of master and servant that puts upon the master the duty of taking such reasonable care of the servant as the existing circumstances will permit."

Thus in the case of an employee as in that of a passenger, the duty to minister with due care to the necessities of the injured person, does not arise because the company assumed the burden of caring for him, but rather because the relation casts upon it the duty to act.

Is this doctrine peculiar to railways? It applies also to seamen,[8] for they even more than railway employees are likely to be injured in places where they are dependent upon their employer for assistance. But are there not other industries to which it should apply? There are other industries as dangerous as railroading. A severely injured employee in a steel plant may be as much dependent upon aid from his fellow employees as a railway employee injured while crossing the deserts of Arizona. Thus there would seem to be no good reason for not extending the doctrine to cover all employments—certainly all dangerous employments. The weight of authority seems to extend the rule at least to other dangerous employments.[9]

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[7] Supra, n. 5.

[8] 4 L. R. A. (N. S.) 77; 35 Cyc. 1200.

[9] Bessemer Land & Improvement Co. v. Campbell, (1898) 121 Ala. 50, 25 So. 793, 77 Am. St. Rep. 17; Cushman v. Cloverland Coal & Mining Co. (1908) 170 Ind. 402, 84 N. E. 759; Raasch v. Elite Laundry Co. (1906) 98 Minn. 357, 108 N. W. 477; Hunicke v. Meramec Quarry Co. (1914) 262 Mo. 560, 172 S. W. 43; Salter v. Nebraska Telephone Co. (1907) 79 Neb. 373, 112 N. W. 600; Stager v. Troy Laundry Co. (1901) 38 Ore. 480, 63 Pac. 645; Texas Bldg. Co. v. Drs. Albert and Edgar (1910) 57 Tex. Civ. App. 638, 123 S. W. 716. See contra: Allen v. Hixson (1900) 111 Ga. 460, 36 S. E. 810; Godshaw v. J. N. Struck & Bro. (1900) 109 Ky. 285, 58 S. W. 781; Meisenbach v. Southern Cooperage Co. (1891) 45 Mo. App. 232.

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III.

Trespassers are the third class of persons we have to consider. The duty of active benevolence toward them cannot be made to depend upon the relation between the parties, because the only relation between the owners of a railway and trespassers on its property is that of fellow human beings. If the railway company is required to assist a trespasser whom it has rendered helpless without fault on its part, it must be because under such circumstances it is under legal duty to exercise benevolence toward human beings. But even if the law does not cast upon it that obligation, it may require the company, if it volunteers emergency assistance to the injured man, to exercise due care in giving it.

The leading case on both questions is Northern Central Ry. Co. v. State, Use of Price.[10]

In that case the deceased, a trespasser upon the property of the railway was run into by a train. He was mistaken for dead by the railway employees, who locked him in a warehouse overnight. During the night he regained consciousness, crawled a few feet and died of a hemorrhage. The action for wrongful death was in two counts, the first on the ground that the railway was liable for running into the deceased on the "last clear chance" doctrine, and the second on the ground that even if it were not, it was liable for failing properly to care for him. The court held there was sufficient evidence to sustain the verdict on both counts, saying:

> "From whatever cause the collision occurrred, after the train was stopped the injured man was found upon the pilot of the engine in a helpless and insensible condition and it thereupon at once became the duty of the agents in charge of the train to remove him and to do it with a proper regard to his safety and the laws of humanity. And if in removing and locking up the unfortunate man, though apparently dead, negligence was committed, whereby the death was caused, there is no principle of reason or justice upon which the defendant can be exonerated from responsibility. To contend that the agents were not acting in the course of their employment in so removing and disposing of the party is to contend that the duty of the defendant extended no further than to have cast off by the wayside the helpless and apparently dead man, without taking care to ascertain whether he was dead or alive, or if alive, whether his life

[10] (1868) 29 Md. 420, 96 Am. Dec. 545.

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> could be saved by reasonable assistance timely rendered. For such a rule of restricted responsibility no authority has been produced, and we apprehend none can be found."

If the facts of this case only, and not the opinion of the court are considered, it might be possible to distinguish it on the ground that the injured trespasser was taken from the side of the track, a place where other more careful and kind hearted people might have seen him and ministered to his necessities, and locked in the warehouse where nobody could find or care for him.

If this is the correct explanation of the case, it is obvious that it stands for no new or disputed principle of law. For even if the priest and the Levite were under no obligation to act the Good Samaritan and could walk by on the other side of the road with immunity, so far as the law is concerned, it is clear that they could not throw the wounded Jew into a river to drown or into the bushes where the good Samaritan had no chance of seeing him without being legally answerable for his death.[11]

But this explanation has never been offered, though the case has often been criticised and in Massachusetts has even been stated to stand for nothing but "the last clear chance", doctrine.[12] Further one cannot tell from the facts whether the unfortunate victim would have had a greater chance of life if left beside the railway tracks.

The problem did not again arise until 1901, when on the authority of the Price case alone was decided Dyche v. Vicksburg S. & P. Ry. Co.[13]

In this case the railway company undertook to care for the injured trespasser, but cared for him negligently. In reversing a nonsuit, the court said:

> "It is manifest, as we think, that the railroad company cannot be liable for the original injury of the father of appellant. Nevertheless, we think the jury should have been permitted to pass on the acts of the company in shipping this helpless man to Tullalah, and after they brought him back. Assuming the charge of Dyche as it did, it was charged with the duty of common humanity, and the jury

[11] Adams v. Chicago Great Western R. Co. (1912) 156 Iowa 31, 135 N. W. 21; Weymire v. Wolfe (1879) 52 Iowa 533, 3 N. W. 541; Depue v. Flateau (1907) 100 Minn. 299, 111 N. W. 1; 67 L. R. A. 516, note.

[12] Griswold v. Boston & Maine R. R., (1903) 183 Mass. 434, 67 N. E. 354.

[13] (1901) 79 Miss. 361, 30 So. 711.

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should have been allowed to pass upon whether or not it performed this duty."

New Orleans and N. E. Railway Co. v. Humphreys[14] is a case of a trespasser discovered on the pilot of an engine with his leg shattered and in a helpless condition. Employees carried him into the station and called a physician. He asked the employees to carry him to Hattiesburg, his home, but they refused to do so, preferring to call a physician. Judgment on the verdict was given for the plaintiff, apparently on the ground that if he had been taken through to Hattiesburg on the train he was on instead of being taken off to await the physician, his leg would have been amputated two hours before it was and his chances of life would have been increased. The judgment for the plaintiff was reversed, the court saying:

> "From our standpoint, the railroad employees did what was apparently the proper thing to do; and, even if they did not, there is nothing in their actions to authorize one to believe that they ignored the dictates of common humanity. In reversing this case we have assumed that the railroad company was under the duty to treat the trespasser with ordinary humanity, and, further, that it assumed charge of him when they took him from the locomotive. If a mistake was made, it was a mistake of judgment, and for this mistake the railroad is not liable."

The three cases just considered require the railway company, if it volunteers emergency assistance to an injured trespasser, to exercise due care in giving it. We shall next consider the two cases denying the liability of a railway for negligently caring for an injured trespasser. The following quotation is from one of them, Griswold v. Boston & Maine R. R.[15]

> "But there is another view of this case, which strikes at the foundation of the plaintiff's claim. Her counsel has referred us to no case which supports the proposition that, if a person is injured through no fault of a railroad company the latter owes a legal duty to the person injured to assist him. There is, of course, a moral duty, but in performing that duty the company is not liable if one of its servants does not use his best judgment in affording the necessary assistance. The case of Dyche v. Videsburg, Shreveport and Pacific R. R. 79 Miss. 361, 30 South. 711, proceeds upon the singular ground that if a railroad company, though not in fault in injuring a trespasser, assumes charge of him,

[14] (1914) 107 Miss. 396, 65 So. 497.
[15] (1903) 183 Miss. 434, 67 N. E. 354.

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> there is imposed on it the duty of common humanity and whether it has performed this duty is a question for the jury. We cannot accede to the doctrine of this case. If it is law, no humane or gratuitous act could be done without subjecting the doer of it to an action on the ground that the defendant ought to have acted more quickly, or with more judgment. It is a doctrine which would allow an action against a good Samaritan and let a priest and a Levite go free."

The other case is Riley v. Gulf C. & S. F. Ry. Co.[16] In this case the Court reaches the same result as reached in the Massachusetts case and for the same reason; that it would be unjust to punish a man for acting negligently, when he was under no duty to act at all; but reaches it by laying down the rule that no employee has authority to assume the duty of caring for an injured trespasser without special authority.

The reasoning of the Massachusetts case sounds very plausible. In some cases the situation of the injured man undoubtedly is such that his only choice is between receiving the negligent attention offered by the railway company or being left to die unattended. But in many cases this is not so. The fact the railway company has undertaken to care for the injured man might prevent other people from offering their services. In none of the cases did it appear from the facts that if the railway company had not cared for the trespasser nobody else would. Unless it so appears the reasoning of the Massachusetts case falls down. The railway company by taking charge of the man, has, under the pretense of doing him a service, done him an injury. The situation is similar to that of a railway company which places a flagman at a crossing who negligently fails to signal to automobiles the approach of a train. In such a case[17] the Massachusetts court holds that though there was no duty upon the company to place the flagman at the crossing, having undertaken to warn the public, it must do so.

Furthermore there is nothing anomalous in the situation that a man who was originally under no liability to act, becomes liable to exercise due care under the circumstances, if he does act. For example, if you ask me to keep your watch for you, I need not do so; but if I do, I must exercise due care to keep it safely.

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[16] (1913) 160 S. W. 595, (Tex. Civ. App.)
[17] Sweeny v. Old Colony etc. Rd. Co. (1865) 10 Allen 368.

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Thus we find that the cases are three to two in favor of requiring a railway company which undertakes to assist an injured trespasser to exercise due care under the circumstances in so doing.

But what sort of assistance may the railway company give? What the injured man needs is a surgeon. If there is near the place of the injury a hospital which will receive the injured trespasser without charge to the railway, the company may, of course, take him there, and when it has done so, it has fulfilled its duty toward him.[18] But in many cases the trespasser will not be injured near a free hospital and the surgeon will wish to be paid for attending him. In such a case must the railway company pay the surgeon's bill? Apparently it is not required to carry its active benevolence that far,[19] but it may do so. The conductor, brakeman, or whoever is the highest official of the company present, has authority to bind the railway to pay for the surgeon's services, if he wishes to do so.[20] Of course, if higher officials of the company later notify the surgeon that the company will not pay his bill, he cannot collect for services rendered after such notice.[21]

So far we have seen that a railway company is liable for failing to exercise ordinary care to administer to the absolute needs of passengers and employees whose unfortunate injuries it has produced, notwithstanding it may have been without fault in producing such injuries; and that in the case of trespassers the authorities are divided. We have seen also that the relations of carrier and passenger and employer and employee require the railway company to undertake to administer emergency aid to passengers and employees. We come next to the question whether it is under a similar duty to undertake the care of trespassers.

One of the two cases on the subject holds that the duty exists and the other that it does not. In Whitesides v. South-

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[18] Baltimore & Ohio R. R. Co. v. State, use Woodward, (1874) 41 Md. 268; Atchison, T. & S. F. R. R. Co. v. Weber (1885) 33 Kansas 543, 6 Pac. 877.

[19] Vandalia R. R. Co. v. Bryan (1915) 60 Ind. App. 223, 110 N. E. 218.

[20] Bonnette v. St. Louis, I. M. & S. Ry. Co. (1908) 87 Ark. 197, 112 S. W. 220; Vandalia R. R. Co. v. Bryan, supra, note 19; Kendall v. Louisville & N. R. Co. (1903) 76 S. W. 376, (Ky); but see contra, Adams v. Southern R. R. Co. (1899) 125 N. C. 565, 34 S. E. 642; Wills v. International & G. N. R. Co. (1906) 41 Tex. Civ. App. 58, 92 S. W. 273.

[21] Vandalia R. Co. v. Bryan supra, n. 19.

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ern Ry. Co.,[22] decided in North Carolina in 1901, a trespasser was hit by a train and thrown off a trestle in a helpless condition. The train did not stop and the decedent after lying on the ground for many hours died of exposure. The plaintiff was nonsuited in the lower court, but the judgment was reversed on appeal. The action was based on two grounds: first, that the defendant was negligent in running over the deceased; and second, that having hit him it was negligent in not stopping the train to see whether he was hurt, and in not looking after him if he were. The upper court held that there was no evidence on the first point, but that the second ought to have been left to the jury, saying:

> "This is the turning point in the case, because, if the defendant knocked the intestate off the trestle, and knew it had done so, and went on without stopping to look after and care for him, especially on such a night as that, that was such negligence as would make the defendant liable for the result."

The other case is Union Pacific R. Co. v. Cappier.[23] A trespasser was struck by a moving car and injured so severely that he died a few hours later. The railway employees did not at once undertake to care for him. Judgment in the lower court was for the plaintiff on the ground that the railway employees were negligent in not coming to his aid sooner. The upper court reversed the judgment, saying:

> "After the trespasser on the track of a railway company has been injured in collision with a train, and the servants of the company have assumed to take charge of him, the duty arises to exercise such care in his treatment as the circumstances will allow. We are unable, however, to approve the doctrine that when the acts of a trespasser himself result in his injury, where his own negligent conduct alone is the cause, those in charge of the instrument which inflicts the hurt, being innocent of wrong doing, are nevertheless blamable in law if they neglect to administer to the sufferings of him whose wounds we might say were self-imposed."

Though these two seem to be the only cases, railway or otherwise, in which the question has been decided, there are cases showing how other courts would decide the question if it arose. The court which decided the Price case, for example, would unquestionably have held the railway company liable if

[22] (1901) 128 N. C. 229, 38 S. E. 878.
[23] (1903) 164 Kansas 202, 72 Pac. 281.

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it had not undertaken to care for the trespasser. The court in Dyche v. Vicksburg S. & P. Ry. Co., on the other hand, rested its decision merely on the duty of one who has undertaken to assist another, to do so with due care. The cases which do not allow recovery when the railway negligently cares for the injured trespasser deny it on the theory that it would be unjust to hold the company liable for acting negligently when, if it were more inhumane and failed to act at all, it would escape liability. So it is improbable that at present many courts would follow Whitesides v. Southern Ry. Co. But may not more follow it in the future? Is it not possible that this case and the other cases with dicta on the duty of a railway to act according to the dictates of humanity are mere forerunners in an attempt to get away from the common law rule that there is no legal duty to act the good Samaritan?

There is undoubtedly sound reason in favor of the distinctions between the duties owed by a railway company to provide for the safety of passengers, employees and trespassers. But once the injury has occurred, should the duty to care for the injured person depend upon the relation? The courts say the duty arises because it would be inhumane to leave an injured passenger or employee to die for lack of care. But is it any less inhumane if the injured person is a trespasser? If public opinion would not make a distinction, the law should not.

Ten years ago, the late Dean Ames of the Harvard Law School in an article entitled "Law & Morals"[24] pointed out the difficulty of requiring active benevolence when there was no relation between the parties except that of fellow human beings without working great injustice in many cases. Nevertheless, he believed that the law ought to require one to act the good Samaritan in certain cases and that the difficulty of drawing the line was not insurmountable. He suggested that the legislatures of the various states enact that:

> "One who fails to interfere to save another from impending death or great bodily harm, when he might do so with little or no inconvenience to himself, and the death or great bodily harm follows as a consequence of his inaction, shall be punished criminally and shall make compensation to the party injured or to his widow and children in case of death."

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[24] 22 Harvard Law Review 97.

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Similar suggestions have been made by Jeremy Bentham,[25] and Edward Livingston[26] and other legal writers. In Holland a person is required by law to act the good Samaritan in certain cases. By Art. 450 of the Dutch Penal Code:[27]

> "He who, seeing another person suddenly threatened with the danger of death, omits to give or furnish him with assistance, which he can give or procure without any reasonable fear of danger for himself or others, is punished, if the death of the person in distress has resulted, with three months' imprisonment and fine."

The cases cited in this article, however, attack the problem from a somewhat different angle. They consider the duty of active benevolence, not of a mere passer-by like the good Samaritan, but of a man who has injured another under such circumstances that he is not legally responsible for the injury. Whatever one may think of the advisability of the law requiring a passer-by to act the good Samaritan, there should be no doubt of the desirability of the law demanding active benevolence from the person who caused the injury. Therefore it is submitted that it should be the duty of a person who injures another, regardless of liability for the injury and of whether there is any relation between the parties, to exercise due care under the circumstances to minister to the immediate necessities of the injured person, if that person is rendered by the injury incapable of caring for himself and if death or severe bodily injury is likely to occur if assistance is not given.

Such a rule would not be as broad as that suggested by Dean Ames, since it would not cover all situations in which good morals require a man to act the good Samaritan, but it would be a step in that direction. It would be broader than that of Dean Ames in requiring due care under the circumstances without regard to inconvenience to the person causing the injury. The cases in which it has been applied do not indicate that it would be difficult of enforcement or likely to cause injustice in practice. Further it would be merely enforcing universally a duty which we have seen several courts already require of railways.

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[25] 1 Bentham's Complete Works, edition 1859, 164.

[26] 2 Complete Works of Edward Livingston on Criminal Jurisprudence 126-127.

[27] H. A. D. Phillips on Comparative Criminal Jurisprudence, Introduction, 5.

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British Emergency Legislation[1]

THE present article deals with British Emergency Legislation since April 1917. From that date it includes Acts of Parliament to December 1918.

The Acts will be considered under the following heads: (a) Organization of Forces; (b) Care of Forces and their Dependents; (c) Economic Welfare of the Country; (d) Prevention of Demoralization and Maintenance of Order; (e) Acts Directed against the Enemy; (f) Reconstruction; and (g) Miscellaneous.

Organization of Forces.

In July of 1915 a National Registration Act had been passed providing for the registration of all people between the ages of 15 and 65. No provision was made for the registration of people as they reached the age of 15. Therefore, on February 6, 1918 the National Registration (Amendment) Act, 1918,[2] was passed which provided for the registration of all male persons who were not liable to registration on August 15, 1915 under the previous act. This would include at the time of passing about a million boys between the ages of 15 and 17½[3] as well as discharged men who had not registered in 1915 because they were members of some part of the King's naval, regular or territorial forces at that time. After the passing of this act men were to register as they were discharged or reached the age of 15. Any one who failed to register under the 1915 act and should have done so was to register at once. The idea of registering everyone, especially discharged men, was to make it possible to have a complete register of all males between the ages of 15 and 65. The men would not necessarily be used in the fighting forces but might be used in industrial work.[4] As registered men changed their occupation, profession, or address they were to notify the local registration authority. If they lost their certificate of registration they could apply to the local authority who would furnish them a new one. Unregistered persons arriving in the United Kingdom were given 14 instead of 28 days in which to register. The employer was given the right

[1] This article is intended to serve as a continuation of an article, "British Emergency Legislation During the Present War" by Dr. L. Ehrlich, which appeared in the California Law Review for September, 1917.

[2] 7 & 8 Geo. 5 c. 60.

[3] 101 H. C. Deb. 5s. p. 614.

[4] 101 H. C. Deb. 5s. p. 615.

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at any time to ask to see the certificate of registration of every male between the ages of 15 and 65 in his employ as well as of every male within those ages who applied for work. The employer was to allow them 7 days in which to show the certificate, at the end of which time he was to notify the local registration board, constables, or any person authorized in that behalf by the Director-General of National Service, of those who had not shown their certificate. The Act of 1915 applied to women as well as men. The Act of 1918 applied to men but gave the King the right by an Order in Council to extend it to women, except the part referring to the demands of the employer, police, etc.

The Military Service Act, 1918,[5] also passed on the 6th of February, gave the Director General of National Service power to withdraw by an order any certificate of exemption at any time. This applied to the exemptions obtained, under the Military Service Acts of 1916 and 1917 on occupational grounds or by a man who had voluntarily attested.[6]

The Military Service (No. 2) Act, 1916, subjected all males between the ages of 18 and 41 to compulsory enlistment. April 18, 1918, Military Service (No. 2) Act, 1918,[7] received the royal assent. It raised the age of compulsory enlistment to 51 for every male British subject who had been in Great Britain at any time since August 14, 1915. These men as well as those who attained the age of 18, with a few exceptions, were to be deemed as duly enlisted in the King's regular forces for general service or in reserve for the period of the war. The age was further extended to 56 for qualified medical practitioners, and the King by an order in council could extend the age to 56 for men generally or any class of men. By an order in council the King could extend the Act to Ireland, and by a proclamation he could withdraw any or all certificates of exemption in case of a national emergency. These orders in council and proclamation had to be laid before the Houses and, if either House within 14 days presented the King with an address praying that any of them be annulled, the King in council could annul them.

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[5] 7 & 8 Geo. 5 c. 66.

[6] A man who voluntarily attested was one who voluntarily registered and classified himself. Classification in England was according to age and men were called into the service with respect to this classification.

[7] 8 Geo. 5 c. 5.

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Many aliens of allied countries, particularly Russians of whom there were at least 30,000 in England of military age, were buying up the business of English soldiers as these went to the front, thereby reaping many benefits and much wealth at the expense of the soldiers. Besides, they were weakening the man power of their own country and were not helping the allies.[8] The Military Service (Conventions with Allied States) Act, 1917,[9] was passed to help remedy this condition. According to the Act, the King by an order in council could signify that a convention had been made with a foreign country, allied or otherwise, acting in naval or military co-operation with the King in the war, imposing mutual liability to military service on the British in that country and on the subjects of that country in the United Kingdom. This would not affect a British subject in another country if he could prove to the British Ambassador or other public minister in that country that he was not domiciled in the contracting country, or that before going to that country he was ordinarily resident in some part of the King's dominions other than Great Britain. A British subject returning to Great Britain if not ordinarily resident there was to be deemed so for the purposes of Military Service Acts 1916 and 1917, from the date of his arrival, unless he could show that the part of the King's dominions last resided in was some part other than Great Britain. The convention between the countries was to provide that the subjects, if they wished, would be allowed to return to their country.

The Air Force (Constitution) Act, 1917,[10] which was to continue in force as long as the Army Act, was "An Act to make provision for the establishment, administration, and discipline of an Air Force, the establishment of an Air Council, and for purposes connected therewith". The King was given the authority to raise and maintain an Air Force. Any man in the service of the Naval or Military Forces with his consent and subject to the approval of the Admiralty or Army Council could be transferred by the Air Council to the air force for the period of the war or a period not exceeding 4 years. He would not be liable to serve with this force for any longer period than he would be liable to serve if he continued in the

[8] 93 H. C. Deb. 5s. p. 1551.
[9] 7 & 8 Geo. 5 c. 26.
[10] 7 & 8 Geo. 5 c. 51.

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force from which he was transferred. Men who had been deemed by the Military Service Acts 1916 and 1917 enlisted in the regular forces and had been transferred to the reserve, or volunteer enlisters so transferred could be called up for service and be liable to be placed in the Air Force. The Air Council was to consist of one of the King's Principal Secretaries of State as President with other members appointed by the King by order in council. This body would take the place of the Air Board constituted under the New Ministries and Secretaries Act, 1916, which Board would thereupon cease to exist. The King under the hand of the Secretary acting as President of the Air Council could make orders respecting the government, discipline, pay, allowances and pensions of the Air Forces, and other matters and things relating to it. The officers would enjoy all the powers, rights, immunities, and privileges enjoyed by other commissioned officers. The Army Act then in force, subject to a few modifications, was to apply to the Air Force.

The Royal Naval Reserve Act, 1859, provided for calling into actual service the Royal Fleet Reserve, Royal Naval Reserve, and Royal Naval Volunteer Reserve. According to the Act the men are liable to service for 3 years, while the King by proclamation may extend the term for the Royal Naval Reserve and Royal Fleet Reserve to 5 years.[11] The term of service for all three divisions was up August 3, 1917, and since the term for the Royal Naval Volunteer Reserve could not be extended by proclamation, Parliament passed the Royal Naval Volunteer Reserve Act, 1917,[12] giving the King power during the war, on any emergency, by proclamation to extend the term of service of the volunteers to 5 years from the date of their coming into actual service, if their services be so long required.

Care of Forces and Their Dependents.

During this period three bills relating to the administration of war pensions received the royal assent. The first one of these acts, Naval and Military War Pensions, &c (Administrative Expenses) Act, 1917,[13] provided that all administrative expenses of any local committee established under the Naval and Military War Pensions &c Act., 1915, should be defrayed

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[11] 93 H. C. Deb. 5s. p. 2086.
[12] 7 & 8 Geo. 5 c. 22.
[13] 7 & 8 Geo. 5 c. 14.

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by the council of the County or borough or urban district for whose area it was established. The Naval and Military War Pensions &c (Transfer of Powers) Act, 1917,[14] dissolved the Statutory Committee, which had the supervision of local committees as well as other powers pertaining to pensions, and transferred these powers to the Minister of Pensions, except some powers repealed by the Act and others given to a committee, the Special Grants Committee, to be constituted by the Minister of Pensions. The members of the Statutory committee, however, were to be transferred and attached to the Ministry of Pensions. The funds of the committee were to be divided, £500,000 to go to "the Ministry of Pensions (Special Grants) Account" while the rest was to go to the Exchequer. Under the Naval and Military War Pensions, &c (Committees) Act, 1917,[15] each local or district committee constituted under the Naval and Military War Pensions, &c Act, 1915, was to include at least two disabled men discharged from the naval or military service during this war and a woman in receipt of a pension as a dependent of a man who had died from causes arising out of his service in the war. Likewise sub-committees of any county or county borough, or any joint committee was to include at least two disabled men.

The National Insurance (Part I. Amendment) Act, 1917,[16] reduced by 5 shillings a week the insurance paid a man formerly in the naval or military service who had been disabled in this war and was being paid a pension. This reduction was to be effective as long as he received a pension. By the National Insurance Act, 1911, an unemployed man was to receive one week's out-of-work benefit for every five weeks contribution paid. It was considered that conditions vary in different cases and that it is desirable for those who pay the benefit to have power to modify the proportion to be paid out.[17] Accordingly the National Insurance (Unemployment) Act, 1918[18] gave this power to the parties concerned. The Police Constables (Naval and Military Service) Act, 1917,[19] provided for an increase of the weekly allowance paid to the wives and children of

[14] 7 & 8 Geo. 5 c. 37.
[15] 7 & 8 Geo. 5 c. 54.
[16] 7 & 8 Geo. 5 c. 15.
[17] 100 H. C. Deb. 5s. p. 940.
[18] 7 & 8 Geo. 5 c. 63.
[19] 7 & 8 Geo. 5 c. 36.

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married constables in the naval or military service. This act did not extend to Ireland.

In Scotland before anyone can act as an executor of a deceased person, he must go to court and obtain confirmation which is granted, according to the existing law, only after a distinct and definite proof of the death of the person whose estate is concerned. This caused a difficulty with regard to the estates of soldiers reported missing. Some judges under the law refused confirmation.[20] To rectify this difficulty the Confirmation of Executors (War Service) (Scotland) Act, 1917,[21] was passed. According to this Act petitions or applications for confirmation to the estates of persons serving in the naval or military forces of the Crown, and reported missing and presumed to be dead, must be accompanied with a certificate or intimation issued by or on behalf of the Admiralty or the Army Council which states that the report of death has been accepted for official purposes. This was to be considered as an oath or affirmation that the person died on the date appearing in the certificate or intimation. The provision was made, however, that 12 months must have elapsed between the date of death and filing of the petition or application, or 6 months elapsed since the date when the certificate or intimation was issued.

Section 11 of The Wills Act, 1837, authorizes "Any soldier in actual military service, or any mariner or seaman being at sea, to dispose of his personal estate as he might have done before the passing of that Act, though under the age of 21 years." The Wills (Soldiers and Sailors) Act, 1918,[22] extends this section to any member of the naval or marine forces not only when at sea but when so circumstanced that, if he were a soldier, he would be in actual military service within the meaning of the section.

The Workmen's Compensation (War Addition) Act, 1917,[23] increased by 25 per cent the amount paid to workmen, entitled during total incapacity to a weekly payment by way of compensation under the Workmen's Compensation Act, 1906. This Act came into effect on September 1, 1917, and was to continue in force till 6 months after the war.

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[20] 94 H. C. Deb. 5s. p. 2136.
[21] 7 & 8 Geo. 5 c. 27.
[22] 7 & 8 Geo. 5 c. 58.
[23] 7 & 8 Geo. 5 c. 42.

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The Billeting of Civilians Act, 1917,[24] as explained by another writer,[25] "is an interesting illustration of the way in which workers far away from the battlefield have to be taken care of in the interest of modern warfare. A central Billeting Board (on which at least two seats are reserved for women) is to take charge of the question of billeting civilians, wherever any Government departments certify that the carrying on of any work is of national importance for the purposes of the present war and necessitates the provision of accommodation in any locality for persons employed on that work (which may be munitions work or any other kind of work.) The Act prescribes in detail how the Board shall form local committees and make regulations for them. It makes it compulsory for the occupier of any premises within a locality where the Act is in operation to give to the local committee any information reasonably required of him, to provide (if required to do so under the Act) billets, attendance, and meals or food for the persons billeted; the Act also lays down rules as to the settlement of disputes, as to the behavior of persons billeted, and as to compensation and other payments due to the occupier of the premises. The Act, furthermore, contains rules as to cases in which billeting can not take place without the consent of the occupier of the premises. The Act does not extend to Ireland." At the time this Act was passed the housing of workers brought to districts to increase the iron ore output was acute. It took more time, money and labor than the government had to spare to build barracks or small towns for the workers.[26]

Economic Welfare of the Country.

An Act which is to be effective until December 3, 1922, is the Corn Production Act, 1917.[27] The legislators of England realized that it was for the best interest of their country that every pound of bread and meat that could be raised at home should be raised there. Then, too, they wished to make it possible for returning soldiers and sailors to settle on the land under more prosperous conditions than heretofore. With these

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[24] 7 & 8 Geo. 5 c. 20.
[25] Ludwik Ehrlich, "British Emergency Legislation During the Present War", pp. 440-441, n. 6., supra, n. 1.
[26] 92 H. C. Deb. 5s. p. 2127.
[27] 7 & 8 Geo. 5 c. 46.

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ideas in mind they passed the above named act. The act includes many things of interest. A minimum price for wheat and oats was to be paid. Provision was made that if the average price paid for these grains was less than the minimum price the occupier was to be paid, in the case of wheat, four times, and oats, five times the difference between the minimum and average for each acre on which the grain was grown, provided it was not mixed with another crop, in which case the Board would decide what should be paid. An Agricultural Wages Board was to be established to fix the minimum wages for workmen in agriculture. Complaints as to inadequate payment for piece work where no minimum rate had been fixed was to be made to this committee. Agricultural rents were not to be raised because of the act. The Board of Agriculture and Fisheries if it thinks "(a) that any land is not being cultivated according to the rules of good husbandry; or (b) that for the purpose of increasing in the national interest the production of food, the mode of cultivating the land or the use to which any land is being put should be changed" is given power to serve notice on the occupier to change his plans. Of course, if the change means a breach of contract or covenant the Board can direct that such contract or covenant be suspended in so far as it impedes compliance with the directions. If the occupier fails to cultivate the land as directed and if he is a tenant, the Board can authorize the landlord to determine the tenancy of the holding; but if he is the owner, the Board can enter and take possession (either themselves or any person authorized by them) and cultivate it. If the crop is being destroyed by rabbits or vermin and the Board is satisfied that the occupier is not destroying them it may send in a person to destroy the vermin charging the costs to the occupier.

The Local Government (Allotments and Land Cultivation) (Ireland) Act, 1917,[28] was passed "for the purpose of enabling district councils to promote the cultivation of land during the present war." The Local Government Board was given power to authorize any urban district council to provide allotments for persons resident or employed in their district and further authorized any urban or rural district council to supply manures, seeds and agricultural implements to the holders or tenants of

[28] 7 & 8 Geo. 5 c. 30.

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allotments or laborers' plots provided by the council and of small holdings situated within their district.

The extension and cultivation of flax were recognized to be essential for various purposes of national importance, including purposes connected with the war. Companies concerned in such cultivation needed financial assistance. To make this assistance possible the Flax Companies (Financial Assistance) Act, 1918,[29] was passed which provided that during the war and for 12 months thereafter, any company, association, or body of persons having received the consent of the Board of Trade could give financial assistance to flax companies.

By the Statutory Undertakings (Temporary Increase of Charges) Act, 1918[30] the government department, when it thinks the financial position of any undertaking, as tramway, supply of gas, water, hydraulic power and electricity has been adversely affected by circumstances arising out of the present war, may by an order provide for the modification of any statutory provisions regulating the charges to be made by the undertakers. This act is only effective for 2 years after the close of the war. The Courts (Emergency Powers) Act, 1917,[31] gives the courts power to annul contracts for the construction of any building or work, or for the supply of any materials for any building or work which was entered into before August 4, 1914, if the Court thinks that the contract cannot be enforced without serious hardships owing to war conditions. Likewise the Court can suspend or annul any contract, as for the supply of water, light, heat, etc. which it thinks cannot be enforced without hardship due to the Defence of the Realm enactments, etc. This act further provides that no member of the House of Commons can be disqualified because of a contract or agreement entered into during the war as to the price or compensation to be paid him by the Government for any property requisitioned or needed by the Government. By the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, a landlord could not raise a tenant's rent or put him out, but he might sell the property and the new owner could put the tenant out.[32] The Increase of Rent, &c (Amendment) Act, 1918,[33] stopped this

[29] 8 & 9 Geo. 5 c. 24.
[30] 8 & 9 Geo. 5 c. 34.
[31] 7 & 8 Geo. 5 c. 25.
[32] 105 H. C. Deb. 5s. p. 495.
[33] 8 Geo. 5 c. 7.

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practice for any one purchasing after September 30, 1917. The Act did not stop the right to purchase, but caused the purchaser to wait until after the war before occupying.

The Coal Mines Control Agreement (Confirmation) Act, 1918,[34] confirmed the agreement dated July 20, 1917 which provides for the compensation to be paid the owners of mines controlled by the Government. The Agreement is to cease to have effect, if not previously determined, 6 months after the termination of the war. The Fishery Harbours (Continuance of Powers) Act, 1917,[35] continued the power of making orders under the Fishery Harbours Act, 1915, until December 31, 1918. These powers were to have expired in 2 years. The Defence of the Realm (Food Profits) Act, 1918,[36] provided that any person selling goods at prices in excess of those allowed by the Food Controller should forfeit to the King double the amount received from the sale.

PREVENTION OF DEMORALIZATION AND MAINTENANCE OF ORDER.

Before April 26, 1917 three acts had been passed lengthening the life of Parliament. Besides the first three, three more were passed: Parliament and Local Elections Act, 1917,[37] was passed April 26, 1917, lengthening the life of Parliament a few months; Parliament and Local Elections (No. 2) Act, 1917,[38] was passed November 29, 1917 extending the life of Parliament 8 more months; and Parliament and Local Elections Act, 1918,[39] was passed July 30, 1918, thus prolonging the life of Parliament 6 additional months. When this Parliament began its life it reduced its term from 7 to 5 years. If it had not taken this step only 2 of the 6 acts just mentioned would have been necessary.[40] In the debates concerning these bills it was pointed out that to pass them was illegal;[41] that there was the danger of setting up a precedent;[42] and that the longer Parliament lived the further away was its contact with the electors.[43] On the other side it was stated that so long as the register remained

[34] 7 & 8 Geo. 5 c. 56.
[35] 7 & 8 Geo. 5 c. 39.
[36] 8 & 9 Geo. 5 c. 9.
[37] 7 Geo. 5 c. 13.
[38] 7 & 8 Geo. 5 c. 50.
[39] 8 & 9 Geo. 5 c. 22.
[40] 99 H. C. Deb. 5s. p. 244.
[41] 92 H. C. Deb. 5s. p. 1548.
[42] 92 H. C. Deb. 5s. p. 1543.
[43] 99 H. C. Deb. 5s. p. 240.

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unchanged, an election would not give an expression of the views of the country, for many of the registered voters of July 1913 were on the battlefield (the bye-elections showed only 50% to 65% of the electors available);[44] that it was a bad policy to plunge the country into an election during the war;[45] that many members of the House who would wish to continue serving their constituencies were at the front; and that an election would be an uneconomical use of paper.[46] Parliament and Local Elections (No. 2) Act, 1917, provided further for the postponement of local elections, whether they had already been postponed or not, for another year, where the next statutory election was supposed to take place before October 1, 1918. The act of 1918 further postponed for another year the local elections of Great Britain, which should take place on or before March 1, 1919, and those of Ireland which should take place on or before March 15, 1919.

February 6, 1918 the Representation of the People Act, 1918,[47] received the royal assent. This bill was before Parliament for some time before it became an act. It was the result of the resolutions laid before the House of Commons by the Speaker's Conference which had met from October 1916 to January 1917. The bill was introduced into the House of Commons May 1917. Among the most important provisions was the giving of the vote to women, and making it possible for men in the service to vote. Men who had served in any of the forces during the war were given the right to vote at the age of 19. By this act these men were given a chance to vote and under the act an election was held in December 1918.

Under the Munitions of War Act, 1917[48] it is unlawful for a person to give employment to a workman who has been employed in connection with munitions work of a certain nature, unless they receive the consent of the Minister of Munitions. During the war this Minister, if he thought it necessary in order to maintain the output of munitions, might give direction as to the remuneration to be paid for work which at that time is paid at time rates. Controlled establishments can not, accord-

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[44] 92 H. C. Deb. 5s. p. 1534.
[45] 92 H. C. Deb. 5s. p. 1524.
[46] 92 H. C. Deb. 5s. p. 1535.
[47] 7 & 8 Geo. 5 c. 64.
[48] 7 & 8 Geo. 5 c. 45.

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ing to the act, alter piece prices, time allowances, or bonuses on output, or rates or prices payable under any other system of payments by results except in accordance with procedure which has been adopted by agreement between the owner of the establishment and the workmen before this act was passed and in force at that time, or by the direction of the Minister of Munitions, "which direction shall not be given except in accordance with an agreement between the owner of the establishment and the trade unions representing the workmen affected by the alteration." No workman in munition factories by this act could be discharged because he was a member of a trade union or because he had taken part in a trade dispute.

Before August 21, 1917, when the Solicitors (Examination) Act, 1917,[49] was passed, the Law Society was required to hold three times a year each of the three examinations which a man had to pass before becoming a solicitor. During the war there was not a sufficient number of candidates to justify more than two of each examinations a year.[50] Thus this act, which provided that it was not necessary to hold more than two of each of the solicitor's qualifying examinations. The Law Society could permit any candidate for final examination to present himself for examination at any time within six months before the termination of his term of service under the articles of clerkship. This law does not extend to Ireland or Scotland and is to continue at least for one year after the termination of the war. Under the Solicitors (Articled Clerks) Act, 1918,[51] any articled clerk, who had served in the forces or any other public service connected with the war, of a character approved by the Master of Rolls, or had been detained as a civic or military prisoner in an enemy country since August 3, 1914, was to be reckoned for all purposes as having spent that time under his Articles of Clerkship if the Law Society was satisfied as to the fact and length of such service, detention or internment, and if the articled clerk had complied in other respects with the acts. This act, also, does not refer to Ireland and Scotland.

Another act which likewise does not apply to these countries is the Juries Act, 1918.[52] According to this act, except in a

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[49] 7 & 8 Geo. 5 c. 43.
[50] 97 H. C. Deb. 5s. p. 522.
[51] 8 & 9 Geo. 5 c. 16.
[52] 8 & 9 Geo. 5 c. 23.

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few cases, every action, counterclaim, issue, cause, or matter in the High Court requiring to be tried shall be tried by a judge alone without a jury. The upper age limit for jury service was extended from 60 to 65 years. The King by an order in council was empowered to modify statutory provisions relating to the preparation and publication of jury lists in order to avoid unnecessary expense. By the act a Coroner, if he is satisfied with all the circumstances, may hold an inquest without a jury, except in the case of a person dying in prison or a person appearing to have met death by murder or manslaughter. This act is to be effective for six months after the war. The Coroners' (Emergency Provisions) Act, 1917,[53] provided that during the war and for six months thereafter, 11 instead of 23 jurymen should be summoned by the coroner and that 7 instead of 12 should be on the jury.

According to Societies (Suspension of Meetings) Act, 1917,[54] when the appropriate authorities are satisfied, the meetings of approved societies, friendly societies, or trade unions could be dispensed with during the war. The societies would have to show that it would be inexpedient to meet because of the small number who would assemble or the number who would have to travel for the meeting. The old officers, in such cases, would remain in office. Due to vacancies in the ranks of the clergy with others wanting to enter the service it was necessary for Parliament to pass an act relating to ecclesiastical services since there were legal difficulties for suspending services otherwise. According to law certain services must be held in the churches and no power could suspend them at will.[55] This act, Ecclesiastical Services (Omission on Account of War) Act, 1917,[56] provided that during the war and for 3 months thereafter, the clerk in holy orders authorized in writing by the bishop of the diocese may omit "all or any public services or duties in or in connection with any church, chapel, or other place of public worship." It was not intended that the church should be closed entirely but that the services would alternate from church to church. John Wesley in his Deed of Declaration or Deed Poll dated Februory 28, 1784 makes provision for the yearly con-

[53] 7 & 8 Geo. 5 c. 19.
[54] 7 & 8 Geo. 5 c. 16.
[55] 91 H. C. Deb. 5s. p. 2142.
[56] 7 Geo. 5 c. 5.

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ference of the Methodists and the powers of that conference. The 11th regulation provides: "the Conference shall not nor may nominate or appoint any person to the use and enjoyment of or to preach and expound God's Holy Word in any of the chapels and premises so given or conveyed, or which may be given or conveyed upon the trusts aforesaid, who is not a member of the Conference or admitted into connection with the same, or upon trial as aforesaid, nor appoint any person for more than three years successively to the use and enjoyment of any chapel and premises already given or to be given or conveyed upon the trusts aforesaid, except ordained ministers of the Church of England."[57] This regulation could not be changed without the authority of Parliament; so that body passed the Wesleyan Methodists (Appointment during the War) Act, 1917[58] which provided that during the continuance of the war and thereafter until the holding of the next conference, the provisions of this regulation should be changed so as to omit the words after "upon trial as aforesaid."

Acts Directed Against the Enemy.

By the British Nationality and Status of Aliens Act, 1918,[59] the Secretary of State can revoke by order the certificate of naturalization granted by him which he is satisfied was granted under false representation or fraud or concealment of material circumstances, or if the person to whom it is granted shows himself by act or speech to be disloyal to the King. Unless the Secretary of State so orders, the wife and minor children of any such person will remain British subjects. After six months she can make a declaration of alienage and then she and the minor children will cease to be British subjects. If by birth she is British, the Secretary of State can not make an order of alienage for her unless he is satisfied that if she had held a certificate of naturalization in her own right it could have been revoked. Persons affected by this part of the act will be considered aliens and subjects of the State to which they belonged when they got their certificate. For 10 years after the termination of the war no certificate of naturalization can be granted in the United Kingdom to any subject of a country which at the time of

[57] 7 & 8 Geo. 5 c. 29.
[58] See n. 57, supra.
[59] 8 & 9 Geo. 5 c. 38.

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the passing of the act (August 8, 1918) was at war with the King, except: (a) a man who served in the forces of the King or his allies or any country acting in naval or military co-operation with the King; (b) a member of a race or community known to be opposed to the enemy Government; and (c) a man who was at birth a British Subject. The Titles Deprivation Act, 1917[60] provided for a committee of the Privy Council which should "inquire into and report the names of any persons enjoying any dignity or title as a peer or British prince who have during the present war, borne arms against the King or His Allies, or who have adhered to the King's enemies". The report of the committee is to lay on the table of both Houses 40 days, after which, if there has been no motion passed disapproving, it will be sent to the King and the names of such peers will be struck out of the Peerage Roll and all rights and privileges will cease. The successor to such a peer may petition the King to put his name on the Peerage Roll. If the committee approves it will be done.

Trading with the Enemy (Amendment) Act, 1918,[61] gives the Board of Trade power to make an order requiring a company or association of enemy nationality to be wound up whether its business had previously been wound up or not. For 5 years immediately after the termination of the war, and longer if Parliament wishes, no banking business can be carried on within the United Kingdom by (a) a company which is an enemy controlled corporation or (b) a firm or individual, if the business carried on is one, if the war still continued, for which an order for winding up could have been made. At the outbreak of the war the world's markets in nonferrous metals (zinc, copper, tin, lead, nickel, aluminum, etc.) was largely controlled by a group of German metal companies.[62] With the idea of keeping this industry free from the control of the enemy the Non-Ferrous Metal Industry Act, 1918,[63] was passed which is to remain in force for 5 years after the termination of the war. The act makes it unlawful to carry on the business of winning, extracting, smelting, dressing, refining, or dealing by way of wholesale trade, in non-ferrous metals or metallic ores unless

[60] 7 & 8 Geo. 5 c. 47.
[61] 8 & 9 Geo. 5 c. 31.
[62] 100 H. C. Deb. 5s. p. 166.
[63] 7 & 8 Geo. 5 c. 67.

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licensed by the Board of Trade. The Board of Trade may require information and inspect documents when it wishes.

RECONSTRUCTION.

As early as 1917 we find Parliament providing for the period after the termination of the war. They wished to be ready for this period as they had not been ready for the war. Accordingly the New Ministries Act, 1917,[64] was passed August 21, 1917, making it lawful for the King to appoint a Minister of Reconstruction who should hold office during the King's pleasure. It is to be his duty to consider and advise upon the problems which might arise out of the war and might have to be dealt with upon its termination. For these purposes he can institute and conduct such inquiries, prepare such schemes, and make such recommendations as he thinks fit. Some of the problems to be considered are: the commercial and industrial policy, the development of national and imperial resources, maintenance of new industries (almost created by the war), supply of raw material, conservation of coal, shipping, agricultural policy, demobilization, housing, education, etc.[65] The office is to cease 2 years after the conclusion of the war or at an earlier date if fixed by the King in Council. The powers of the Minister of Munitions were extended by the Ministry of Munitions Act, 1918,[66] to include the supervision and regulation of the diversion to the production of articles required in times of peace, of the industries established or utilized during the present war for the purpose of the production of war material.

The Defence of the Realm (Employment Exchanges) Act, 1918,[67] authorizes taking possession by the Commissioners of Works with the consent of the Treasury, of land, including buildings, which the Minister of Labour certifies is required in connection with any scheme of demobilization for purposes of employment exchanges or for the accommodation of the staff of any department of the Ministry constituted for reinstating in civil life the people who, during the war, were engaged in the King's forces or any work of national importance.

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[64] 7 & 8 Geo. 5 c. 44.
[65] 96 H. C. Deb 5s. p. 1606.
[66] 8 & 9 Geo. 5 c. 60.
[67] 8 & 9 Geo. 5 c. 58.

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MISCELLANEOUS.

The Naval Prize Act,[68] provided for a Naval Prize Fund to be placed under the control of the Admiralty. The money received from the sale of captured merchant ships and cargoes was to be put in this fund and from it was to be drawn the money for certain costs, charges, expenses and claims as well as a grant of prize money. The Post Office Act, 1918,[69] makes it lawful to alter the statutory limits of postal rates, increasing them if thought necessary.

On August 21, 1917 and July 30, 1918 were passed War Loan Act, 1917,[70] and War Loan Act, 1918,[71] respectively. These were to provide for the raising of money for the war, as their name implies. The Government War Obligations Act, 1918,[72] provided money for the fulfillment of Government war obligations incurred since the passing of the Government War Obligations Act, 1916.

The Termination of Present War (Definition) Act, 1918,[73] which was passed November 21, 1918 gives the King in Council power to declare the date that is to be treated as the termination of the war. Likewise, the King in Council is to declare the date to be treated as the date of the termination of war between the King and any particular State. The date so declared should be, as nearly as may be, the date of exchange or deposit of ratification of a treaty or treaties of peace. In the case of any powers of any Government Department or any officer of the Government Department exerciseable during the continuance of the present war, if the King thinks it expedient for those powers to cease before the date fixed, the King in Council may fix an earlier date for the termination of those powers.

H. Geraldine Lester.

Berkeley, California.

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[68] 8 & 9 Geo. 5 c. 30.
[69] 8 & 9 Geo. 5 c. 10.
[70] 7 & 8 Geo. 5 c. 41.
[71] 8 & 9 Geo. 5 c. 25.
[72] 8 & 9 Geo. 5 c. 28.
[73] 8 & 9 Geo. 5 c. 59.

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Editorial Notes

KENNETH L. BLANCHARD

THE article on "The Relation Existing between Irrigation Water Users and Distributing Companies with Special Reference to Rights Arising out of Contract" is the work of Kenneth L. Blanchard, First Lieutenant, U. S. A., Ambulance Service, American Expeditionary Forces, and was submitted as a thesis in partial satisfaction of the requirements for the degree of Juris Doctor at the University of California in 1916.

Mr. Blanchard went to France with one of the first ambulance units from California and saw military duty in the ambulance service of the French Army. In July, 1918, he was awarded the Croix de Guerre for courageous action under heavy

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fire in removing wounded from the front line trenches. He died in France, December 15, 1918.

THE RETIREMENT OF DEAN TAYLOR

The retirement of Dr. Edward Robeson Taylor from the Deanship of Hastings College of the Law and his designation as Emeritus Professor of Law terminate a twenty-year period of distinguished service in that institution. In the letter tendering his resignation, Dr. Taylor says, referring to the portion of his life devoted to the work of legal education, "These years I estimate as the best and the most interesting of my life, and nothing but increasing age tempts me to my present course." Rarely does it fall to the lot of one man to excel in so many and so various pursuits as Dr. Taylor has done—law, literature, politics, education. His testimony therefore as to the satisfaction derived from his work as educator is of peculiar interest. The richness of Dr. Taylor's personality, his generous passion for justice and right, found expression in the teacher, and not only have endeared him to hundreds of pupils but have imparted to them something of the influence of his own character.

The Board of Trustees of Hastings College of the Law has named as the new Dean, Dr. Maurice E. Harrison, lecturer in law at the School of Jurisprudence in this University, a graduate of this school with the degree of Juris Doctor in 1910.

Comment on Recent Cases

BANKER'S LIEN.—By statute in California, "a banker has a general lien dependent on possession, upon all property in his hands belonging to a customer, for the balance due to him from such customer in the course of the business".[1] A similar remedy is given to banks almost everywhere. The theory upon which the right is allowed is that a credit has been extended by the bank upon the securities of the customer which the bank holds or expects to hold in the ordinary course of business.[2] It does not exist until the debt to the bank has matured,[3] unless the customer has consented that it shall,[4] or there has been fraud

[1] Civ. Code § 3054.

[2] The Bank of the Metropolis v. The Bank of New England (1843) 1 How. 234, 11 L. Ed. 115; Russell v. Hadduck (1846) 3 Gilman (Ill.) 233; Furber v. Dane (1909) 203 Mass. 108, 89 N. E. 227.

[3] Jordan v. National Shoe etc. Bank (1878) 74 N. Y. 467, 30 Am. Rep. 319; Elzy v. Morrison (1913) 180 Ill. App. 711.

[4] Roe v. Bank of Versailles (1902) 167 Mo. 406, 67 S. W. 303; Commercial National Bank v. Brinton (1914) 45 Utah 265, 145 Pac. 42.

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on his part,[5] or he is insolvent.[6] Nor will the bank generally be allowed to set off its claim against the customer's deposit, unless the claim is certain, definite, and liquidated, or else capable of liquidation by calculation without the intervention of a jury to estimate the sum;[7] and the almost universal rule is that a bank has no lien on property delivered to it as security for a particular debt[8] or for a specific purpose.[9] When the object for which the property was delivered has been accomplished it is the duty of the bank to return it. This rule remains unchanged under the California Code.[10] Equities of third parties in the property deposited will not prevail over the rights of the bank, unless it had notice of them.[11] So where one bank takes notes indorsed to itself for collection and transmits them to another to balance a mutual account the second bank may hold them as against the real owner for any balance due it from the first.[12] But this is not true if the second bank takes them merely as agent for collection.[13] If the bank is garnished it has the same rights against the garnishor that it had against the debtor[14] and it has been held in California that the lien exists as against the guarantor of a note.[15] Because of the provision of our code[16] the bank may not apply the customer's property in satisfaction of a debt secured by mortgage,[17] though it may if the debt is secured by pledge.[18]

In *First National Bank of Corona v. Coplen*[19] and former California decisions on this subject the courts have applied the above code section[20] without distinguishing between the case

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[5] Bradley v. Seaboard Natl. Bank (1901) 167 N. Y. 427, 60 N. E. 771.

[6] Thomas v. Exchange Bank of Angus (1896) 99 Iowa 202, 68 N. W. 780; Schuler v. Israel (1886) 120 U. S. 506, 30 L. Ed. 707, 7 Sup. Ct. Rep. 648.

[7] Tallapoosa County Bank v. Wynn (1911) 173 Ala. 272, 55 So. 1011.

[8] Masonic Savings Bank v. Bangs, Adm'r. (1886) 84 Ky. 135. Reynes v. Dumont (1888) 130 U. S. 354, 32 L. Ed. 934, 9 Sup. Ct. Rep. 486.

[9] Hanover National Bank v. Suddath (1909) 215 U. S. 110, 54 L. Ed. 115, 30 Sup. Ct. Rep. 58.

[10] Bell v. Bank of California (1908) 153 Cal. 234, 94 Pac. 889.

[11] Central National Bank v. Connecticut etc. Insurance Co. (1881) 104 U. S. 54, 26 L. Ed. 693.

[12] Bank of Metropolis v. New England Bank, supra, n. 2.

[13] American Exchange National Bank v. Thuemmler (1900) 94 Ill. App. 622.

[14] Schuler v. Israel, supra, n. 6.

[15] Melander v. Western National Bank (1913) 21 Cal. App. 462, 132 Pac. 265.

[16] Code Civ. Proc. § 726.

[17] McKean v. German American Savings Bank (1897) 118 Cal. 334, 50 Pac. 656; Gnarini v. Swiss American Bank (1912) 162 Cal. 181, 121 Pac. 726.

[18] Marble Company v. Merchants National Bank (1911) 15 Cal. App. 347, 115 Pac. 59.

[19] (Feb. 5, 1919) 28 Cal. App. Dec. 251, 179 Pac. 708.

[20] Supra, n. 1.

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where the bank had property of the customer in its possession and where the right was attempted to be exercised against a general deposit. Special deposits, chattels, valuables and the like which are in the possession of the bank and which it is under obligation to return exactly as received, clearly come within its provisions. The property remains in the customer and is subject to the lien. But a general deposit is on an entirely different basis. When such deposit is made the money becomes the property of the bank absolutely and the relation between the depositor and the bank is that of debtor and creditor.[21] The depositor becomes the owner of a chose in action and it would not seem to be property of his in the possession of the bank, on which the bank could have a lien. A better theory on which to allow this remedy against a general deposit would be that the bank has a right to offset its indebtedness against that of the customer.[22] Such a right exists independently of the above statute, which by its terms can hardly be said to cover the case of a general deposit, and would not involve the rather anomalous situation of a bank having a lien on its own debt.[23]

The nature of this right may become of practical importance. Take the case, for instance, where the bank holds a note of its customer on which there is a surety. The note comes due and at the same time the principal has a general deposit in the bank. If it has a lien against this deposit for the amount of the note it cannot pay it out without releasing the surety. On the other hand if the bank has merely a right of set-off it may pay its customer's checks and still retain all its rights against the surety.[24]

P. S. M.

BILLS AND NOTES: EFFECT OF WAIVER OF PRESENTMENT: LIABILITY OF ACCOMMODATION INDORSERS INTER SE.—In *Hurlbut v. Quigley*,[1] the first of three accommodation indorsers, who had been compelled to pay to a creditor bank a note by a corporation in which all three were stockholders and officers, sued the last indorser for contribution. The note had been made under an arrangement with the bank that it should be secured by the three stockholders as sureties. The defendant claimed that he was a successive indorser because he had indorsed the

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[21] Smith's Cash Store v. First National Bank (1906) 149 Cal. 32, 84 Pac. 663.

[22] Wynn v. Tallapoosa County Bank (1910) 168 Ala. 469, 53 So. 228; Shuman v. Citizens State Bank of Rugby (1914) 27 N. D. 599, 147 N. W. 388, L. R. A. 1915A 728; Furber v. Dane, supra, n. 2.

[23] But see 9 Harvard Law Review, 146.

[24] The Second Nat'l Bank of Lafayette v. Hill (1881) 76 Ind. 223, 40 Am. Rep. 239.

[1] (April 25, 1919) 57 Cal. Dec. 400, 180 Pac. 613.

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note after it had been handed to the bank. Evidence showed that the bank did not accept the note until it had been indorsed by the defendant. The Supreme Court held that all three parties were liable as joint and several indorsers because the first indorsement was preceded by the following written statement: "For value received I hereby waive presentment, demand, and notice of protest of the within note." Mr. Justice Wilbur dissented on the theory that successive indorsers are considered liable as among themselves in the order in which they indorse, and to let the waiver clause have the effect of making them jointly liable would be converting an agreement which the "law expressly provides shall be that of indorser into a mere contract of guaranty."

It has been generally held that where the waiver is written by the indorser himself in the form "I waive presentment," or the like, that the waiver is simply the individual waiver of the indorser over whose signature it is written[2] and not binding upon others who do not make themselves parties to it. This is on the theory that an indorsement is a separate and independent contract, embodying the terms of the note, but not of any other indorsements. Each indorsement is supposed to speak independently of itself. The contrary view has been adopted in some states[3] and has been held in California.[4] In Farmers' Exchange Bank v. Altura etc. Co.[5] the court held that a printed waiver in the singular number placed on the note by the payee before it was indorsed by the accommodation indorsers and before it was delivered to the payee applied to all such indorsers, as they must be presumed to have read the words and adopted them as their contract. The court there emphasized the fact that the waiver had been stamped on the back of the note by the payee bank. The present case goes further and holds that the waiver written presumably by the first indorser applied to all the indorsers and made the whole contract of indorsement a joint and several contract.

Much may be said in favor of Justice Wilbur's view that the waiver alone should not be held to have that effect, but the decision, although laying too much emphasis on the element of waiver, may be supported on other grounds. The waiver itself was merely one of the circumstances tending to show the intention of the parties.

At common law the exact nature of the liability of one whose signature appeared on the back of a bill or note before that of

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[2] Woodman v. Thurston (1851) 8 Cush. 157.

[3] Parshley v. Heath (1879) 69 Me. 90; Johnson v. Parker (1901) 86 Mo. App. 660.

[4] Farmers' Exchange Bank v. Altura etc. Co. (1900) 129 Cal. 263, 61 Pac. 1077.

[5] Supra, n. 4.

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the payee has been the subject of much conflict and dispute. He has been held to be a maker,[6] a first indorser,[7] a second indorser,[8] a surety,[9] or a guarantor.[10] As between the accommodation indorsers themselves the general rule has been that the relationship was the same as that existing between parties to ordinary business paper. This liability has been held to be that expressed by the paper itself, that is, successive and not joint.[11] In the absence of any agreement the accommodation indorsers of a note are not co-sureties;[12] consequently the right of contribution has been held not to exist as between them.[13] Parol evidence is, however, admissible to show that such indorsers by agreement constituted themselves sureties.[14] The intention of the parties is after all the criterion and this may be shown by parol evidence without conflicting with the rule that parol evidence is inadmissible to contradict or vary the terms of a written contract.[15] The contract of indorsement is one implied by law from the blank indorsement and can be qualified by express proof of a different agreement between the parties and is not subject to the rule which excludes proof to alter or vary the terms of an express agreement.

In California, before the adoption of the codes, a person not a party to a note who indorsed it before delivery was regarded as a guarantor.[16] This is still the rule as regards one who signs across the back of a non-negotiable note.[17] As regards negotiable notes, the rule was changed by § 3117 of the Civil Code and such person is now held to be an indorser and liable to the payee thereon.[18] Accommodation indorsers as between themselves are considered in California co-sureties independent of any agreement to that effect.[19] It would seem in this state that it is only where there is a special agreement between a prior

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[6] Draper v. Weld (1859) 13 Gray 580; Daniel, Negotiable Instruments (6th ed.) § 713a.

[7] Moore v. Cross (1859) 19 N. Y. 227.

[8] Eibert v. Finkheimer (1871) 68 Pa. St. 243.

[9] Ewan v. Brooks-Waterfield Co. (1897) 55 Ohio St. 596, 45 N. E. 1094.

[10] Firman v. Blood (1864) 2 Kans. 496.

[11] Willis v. Willis (1896) 42 W. Va. 522, 26 S. E. 515.

[12] Moody v. Findley (1869) 43 Ala. 167.

[13] Shaw v. Knox (1867) 98 Mass. 214; In re McCord (1909) 174 Fed. 72.

[14] Good v. Martin (1877) 95 U. S. 90; Enterprise Brewing Co. v. Canning (1911) 210 Mass. 285, 96 N. E. 673.

[15] Ross v. Epey (1870) 66 Pa. St. 481, 5 Am. Rep. 394.

[16] Ford v. Hendricks (1868) 34 Cal. 673; Riggs v. Walsh (1852) 2 Cal. 485; Pierce v. Kennedy (1855) 5 Cal. 138; Brady v. Reynolds (1859) 13 Cal. 31.

[17] First National Bank v. Babcock (1892) 94 Cal. 96, 29 Pac. 450, 28 Am. St. Rep. 94. But the signature, if made by a holder of the note, may be treated merely as a transfer, involving no assumption of liability. Kendall v. Parker (1894) 103 Cal. 319, 37 Pac. 401, 42 Am. St. Rep. 117.

[18] Fessenden v. Summers (1880) 62 Cal. 484.

[19] Leeke v. Hancock (1888) 76 Cal. 127, 17 Pac. 137.

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and a subsequent accommodation indorser that the former is liable to the latter as an actual indorser for value.[20]

In the present case whether looked at from the majority or minority rule or under the Negotiable Instruments Law section 68[21] which was not in effect at the time the note was made and which therefore does not control, evidence could be introduced to show the actual relation of the accommodation indorsers.[22] The evidence here was sufficient to justify the finding of the court that the indorsement was joint and not successive. The facts of membership in the corporation, of the arrangement with the payee bank under which the notes were given, of the acceptance of the note only after the defendant's signature was indorsed thereon, together with the acceptance of the waiver, tend to show that the real intention of the parties was to be bound jointly and not successively.

R. P.

CORPORATIONS: STOCKHOLDERS' LIABILITY: STATUTE OF LIMITATIONS.—The plaintiff in the case of *Damiano v. Bunting*[1] was injured through the negligence of the Birchfield Mining Company, a corporation, on May 13th, 1913. He obtained a judgment for damages against the corporation. On May 1st, 1916, the defendant's testator, the principal stockholder, died. The defendant qualified as executrix on May 17th, 1916. The plaintiff did not present his claim until February 27th, 1917. The claim being rejected, the plaintiff brought the present action. The court held that the plaintiff was barred by section 359 of the Code of Civil Procedure which reads as follows: "This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created."

According to the interpretation placed on this section, actions to enforce stockholders' liability must be brought within three years of the time the liability was created.[2] This differs from the usual statutes of limitations which provide that the time

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[20] Leeke v. Hancock, supra, n. 19; Machado v. Fernandez (1887) 74 Cal. 362, 16 Pac. 19; Consolidated Lumber Co. v. Fidelity & Deposit Company of Maryland (1911) 161 Cal. 397, 119 Pac. 500.

[21] California Civil Code § 3149 as enacted in 1917.

[22] Trego v. Cunningham (1915) 267 Ill. 367, 108 N. E. 350, 10 Illinois Law Review 138.

[1] (April 4, 1919) 28 Cal. App. Dec. 809.

[2] Johnson v. Hinkel (1915) 29 Cal. App. 78, 154 Pac. 487; 4 California Law Review, 246; Santa Rosa National Bank v. Barnett (1899) 125 Cal. 407, 58 Pac. 85; L. R. A. 1917 E, 399, note.

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shall run from the accrual of the cause of action.[3] The California provision and the interpretation placed upon it in the case of Hunt v. Ward[4] to the effect that a stockholder's liability for his proportionate share of the corporate indebtedness is a "liability created by law" within the meaning of section 359 of the Code of Civil Procedure, and an action to enforce such liability must be brought within three years after the liability was created, have repeatedly been assailed. The following criticism is taken from a note appearing in the American Law Review:[5] "The decision of the Supreme Court of California is nakedly to the effect that it is competent for the legislature to enact statutes of limitation which shall destroy debts before they mature. Such a statute would be clearly void, either in its operation to existing or to future contracts; and it would be void because it destroys the obligation of the contract which the parties have created for themselves. . . . .

"But the legislature of California have enacted no such statute. The decision is a stolid misinterpretation of the ordinary sense of the statute. The true reading is that such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which . . . . the liability was created. The entire proviso was plainly intended as a qualification applicable to cases where the directors or stockholders are made liable by a statute for frauds upon creditors in wrecking and mismanaging the corporation, and it was intended to fix the limitation within which the aggrieved party, whether the corporation itself, or its receiver, or other legal representative, or a creditor must proceed after discovering the facts upon which the statute predicates the liability."

The plaintiff in the present case attempted to depart from the strict application of section 359 and to come under the provision of section 353 of the Code of Civil Procedure allowing an extension of one year's time for the bringing of an action where the defendant had died. The court insisted that section 359 would not allow such a construction. This decision is in keeping with a former case[6] where the plaintiff attempted to invoke the application of section 351 of the Code of Civil Procedure allowing an extension of time when the defendant is out of or departs from the state after the cause of action accrues. The stockholder in that case was absent from the state but the court refused to interpret the statute so as to allow an extension of time and followed the construction placed on it by Hunt v. Ward.

The present case is of interest not only upon the point of the survival of the stockholders' liability for torts of the cor-

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[3] Royal Trust Co. v. MacBean (1914) 168 Cal. 642, 144 Pac. 139.
[4] (1893) 99 Cal. 612, 34 Pac. 335, 37 Am. St. Rep. 87.
[5] Volume 28, p. 908.
[6] King v. Armstrong (1908) 9 Cal. App. 368, 99 Pac. 527.

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poration[7] but also on the questions in administration and procedure which arise in connection therewith. The statute of limitations which on account of the primary liability[8] of stockholders began to run from the time of the injury, had not run its full course when the stockholder died. Only twelve days remained before the statute would be an absolute bar. The code allows thirty days within which to petition for letters testamentary.[9] At least ten days notice must be given of the petition for probate.[10] So under the usual course of administration a plaintiff would be cut off at least a month before the statute of limitations had run its course. Under section 1299 of the Code of Civil Procedure the plaintiff as one interested in the estate could petition for probate of the will or ask that a special administrator be appointed. But section 1415 of the Code of Civil Procedure provides that a special administrator shall not in any case be liable to an action by any creditor on a claim against the decedent. It would seem to follow that no action could be brought against the special administrator and that the plaintiff's right would be cut off before the statute of limitations had become an absolute bar.

The case exemplifies the harsh results which follow from the effects of the interpretation in Hunt v. Ward and which often render the constitutional provision as to stockholders' liability of no effect.[11] The courts have shown a marked disinclination to reconsider the question.[12] Their point of view is well shown in the following statement taken from the case of Gardiner v. Royer:[13] "It is a settled construction of our constitutional and statutory provisions on the subject, resulting in the conclusion that the statute is not in violation of the constitutional provision, that has been accepted as satisfactory by the people of the state for a period of twenty years, no amendment of either having been made during that time. It goes without saying that upon such a question as this, it is in the highest degree

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[7] Lininger v. Botsford (1916) 32 Cal. App. 386, 163 Pac. 63, 5 California Law Review, 416.

[8] Mokelumne Hill Canal Co. v. Woodbury (1859) 14 Cal. 265; Davidson v. Rankin (1868) 34 Cal. 503; Young v. Rosenbaum (1870) 39 Cal. 646; In re Putnam (1911) 193 Fed. 464; Buttner v. Adams (1916) 236 Fed. 105 .

[9] Cal. Code Civ. Proc. §§ 1298, 1301.

[10] Cal. Code Civ. Proc. § 1303.

[11] Bank of San Luis Obispo v. Pacific Steamship Co. (1894) 103 Cal. 594, 37 Pac. 499. Liability on a note is created on the date of the note. If the note is payable in four years, the statute cuts off the liability at the end of three years, which is before the right to sue has accrued. First National Bank of Redlands v. Consolidated Lumber Co. (1911) 16 Cal. App. 267, 116 Pac. 680. "Liability does not depend for its existence upon the fact that it is immediately enforceable. It may exist without the right of immediate enforcement."

[12] Wells v. Black (1897) 117 Cal. 157, 48 Pac. 1090, 59 Am. St. Rep. 162, 37 L. R. A. 619; Gardiner v. Royer (1914) 167 Cal. 238, 139 Pac. 75.

[13] Supra, n. 12.

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essential that there should be a well understood and thoroughly established rule, and it seems clear to us that the conclusion deliberately reached by this court on this question more than twenty years ago and uniformly adhered to ever since, should not be disturbed. . . . . We do not desire to be understood as intimating that we believe the prior decisions to have been erroneous. We simply decline to consider anew the question presented, accepting the prior decisions as finally determining it."

Is it not a curious commentary upon our legislative methods that the rule in Hunt v. Ward has not been changed by statute?

R. P.

CORPORATION LAW: STOCKHOLDER'S LIABILITY PREDICATED UPON OWNERSHIP.—The question presented in *Shean v. Cook*[1] is whether the fact that the name of a person appears on the books of a corporation as a stockholder makes him liable to creditors under our statutes.[2] As the case shows, the term "stockholder", as used in the Constitution, Article XII, section 3, must be construed in the light of the definition of stockholders contained in section 298 of the California Civil Code, which was in effect at the time said section 3 of the Constitution was adopted; "The owners of shares in a corporation which has a capital stock are called stockholders." Under the constitutional declaration of stockholders' liability carried into section 322 of the Civil Code, that liability is predicated upon ownership of the stock.[3] A reasonable interpretation of these statutes shows that "ownership" must be shown, and it follows that the stock books of a corporation are not conclusive of ownership of stock therein,[4] except in the case of banking corporations, in which they are made so by statute.[5]

The essential foundation of a creditor's right to recover in this class of action is the necessity of proving that the person sued is in fact a stockholder. Stockholders may become such either by original subscription, by direct purchase from the corporation, or by subsequent transfer from the original holders. The relation of a stockholder to a corporation is one of contract, either express or implied.[6] It exists only when a party has either expressly consented to become a stockholder, or his conduct is such that in law his consent will be implied. Nor does the entry of his name in the books as a stockholder preclude him from showing that in fact he was not such a stock-

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[1] (Feb. 28, 1919) 57 Cal. Dec. 292, 179 Pac. 185.

[2] Cal. Constitution, Art. XII, § 3; Cal. Civ. Code, §§ 298, 322, 324.

[3] Western Pac. Ry. Co. v. Godfrey (1913) 166 Cal. 346, 136 Pac. 284, Ann Cas. 1915 B, 825.

[4] Welch v. Gillelen (1905) 147 Cal. 571, 82 Pac. 248.

[5] Cal. Civ. Code, § 321.

[6] Foote v. Anderson (1903) 123 Fed. 659, 661, 61 C. C. A. 5; Carey v.

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holder, and that the issuance of stock in his name was unauthorized.[7] At most, the books are only presumptive evidence that defendant became a stockholder and the presumption may be overthrown by other competent evidence.[8] An examination of the cases holding that parol evidence to contradict the stock book is inadmissible shows that the rule is limited to cases in which defendant consented to having the stock placed in his name on the books of the corporation.[9]

There must be a ratification or acquiescence in such transfers to constitute a liability. If the defendant has accepted any benefits arising from the ownership of the stock thus put in his name on the books, or if he has paid any assessments, or taken part in the stockholders' meetings, such an acquiescence is shown.[10] For example, if a legatee of corporation stock accepts the legacy he must be deemed the owner of the stock from the time of the testator's death.[11] But where, as in the present case, there was an immediate repudiation of the transaction and a refusal to accept the stock or to have anything to do with the matter, no such liability can attach,[12] since the relation is one of contract. There is no contract in such a case, for there is no assent on the part of the offeree, and the essence of a contract is consent to be bound.

Ratification implies a conscious and intended approval of the act done. It must occur with full knowledge of the facts. This being the law,[13] the question in a given case becomes one of evidence—has plaintiff established defendant's liability by sufficient testimony, or has defendant overcome plaintiff's case by evidence sufficient to establish his non-liability? The burden may be shifted to defendant to show that the act of making him a

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Williams (1897) 79 Fed. 906, 910, in which see criticism of Turnbull v. Payson (1877) 95 U. S. 418, 24 L. Ed. 437; 1 Thompson on Corporations (2d ed.) 654.

[7] Shattuck & Desmond etc. Co. v. Gillelen (1908) 154 Cal. 778, 99 Pac. 348; May v. Genesee Co. Sav. Bank (1899) 120 Mich. 330, 79 N. W. 630; Mudgett v. Horrell (1867) 33 Cal. 25.

[8] 1 Thompson on Corporations (2d ed.) 700; Chapman v. Virginian Real Estate Co. (1898) 96 Va. 177, 31 S. E. 74; 4 Thompson on Corporations (2d ed.) 1526; Keyser v. Hitz (1889) 133 U. S. 138, 33 L. Ed. 531, 10 Sup. Ct. Rep. 290; Foote v. Anderson, supra, n. 6.

[9] Baines v. Babcock (1892) 95 Cal. 581, 593, 27 Pac. 674, 29 Am. St. Rep. 158; Moore v. Boyd (1887) 74 Cal. 167, 15 Pac. 670; Hurlburt v. Arthur (1903) 140 Cal. 103, 107, 73 Pac. 734, 738, 98 Am. St. Rep. 17, 24; Abbott v. Jack (1902) 136 Cal. 510, 513, 69 Pac. 257.

[10] National Bank v. Case (1878) 99 U. S. 628, 632; Williams v. Vreeland (1917) 244 Fed. 346; McHose & Co. v. Wheeler (1863) 45 Pa. St. 32; 1 Thompson on Corporations 698.

[11] Western Pac. Ry. Co. v. Godfrey, supra, n. 3.

[12] Mudgett v. Horrell (1867) 33 Cal. 25.

[13] Williams v. Vreeland, supra, n. 10; Glenn v. Garth (1892) 133 N.Y. 18, 33; Welch v. Gillelen (1905) 147 Cal. 571, 82 Pac. 248; Clark & Marshall, Private Corporations, § 795; Stephens v. Follett (1890) 43 Fed. 842; Fowler v. Ludwig (1852) 34 Me. 455.

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shareholder was in the first instance unauthorized, that it was without his knowledge or consent, and that he has not since acquiesced in or ratified it.

The test of liability, therefore, seems to be the fact of being a record shareholder, knowledge of that fact, and some act in approval or ratification.

M. H. V. G.

FIXTURES: OWNERSHIP OF AS BETWEEN VENDOR AND VENDEE IN POSSESSION: RIGHT OF RE-LOCATOR OF MINING CLAIM TO EXISTING IMPROVEMENTS.—Two recent California decisions are worthy of comment because of their bearing on what has been a rather confused subject in the law of this state. In the case of *Chowchilla Colonization Co. et al v. Thompson et al*,[1] it was held that a vendee in possession under a contract to buy land had no right to remove the buildings he had erected. There was a special provision in the contract of sale to the effect that all improvements on the land were to belong to the vendor in the event the vendee failed to fulfill his obligations, and the latter made no attempt to remove the buildings until after defaulting in several payments.

The following general rule was quoted by the court: "Articles annexed or structures erected by a vendee of land who is in possession by virtue of his contract of purchase, but who has not yet obtained title to the premises, cannot be removed by him without the consent of the vendor, the presumption being, from his interest under his contract and expectation of acquiring absolute title, that he intended the articlees or structures to become part of the land."[2] This generalization applies very well to cases in which the vendee has defaulted and lost all equitable interest in the land,[3] but if carried to its full extent leads to inequitable results. The California Supreme Court recognized this limitation, and in the case of Miller v. Waddingham[4] held that under the principle of equitable conversion a vendee not in default was equitable owner, and as such at liberty to remove fixtures so long as he did not impair the vendor's security. The Court pointed out that such a rule operates between a mortgagor and a mortgagee, the latter being entitled to enjoin waste only when he shows that his security is endangered.

Another point not always kept in mind is that the general-

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[1] (Feb. 8, 1919) 28 Cal. App. Dec. 207, 179 Pac. 411.

[2] 13 Am. & Eng. Encyc. Law (2d Ed.) 672. This general rule is widely followed. See Moore v. Vallentine (1877) 77 N. C. 188, 6 Morr. Minn Rep. 112.

[3] Cook v. Enright (1901) 134 Cal. 1, 66 Pac. 3, 2 Morr. Min. Rep. 496; Moore v. Vallentine, supra, n. 2.

[4] (1891) 91 Cal. 377, 27 Pac. 750, 13 L. R. A. 680. This opinion was given on a rehearing. See the case as originally decided, 25 Pac. 688. The court in the first hearing of the case refused to accept the equitable doctrine upon which the decision was finally rested.

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ization above quoted does not apply as between landlord and tenant, and as between the parties to a license. The situation created by an option contract is also peculiar. The court that decided Miller v. Waddingham,[5] the same judge writing both opinions, held in the case of Pomeroy v. Bell[6] that one in possession under an option contract to buy could not remove fixtures before the expiration of the option period. Miller v. Waddingham was not referred to in any way, the court apparently viewing the situation entirely from the standpoint of law as distinguished from the equitable analysis in the Waddingham case. The established rule is that the party in possession under an option has no equitable estate until he exercises his option.[7] Yet the court held that the option holder had an interest of some sort in the land. At common law he would probably be classed as a tenant.[8] This case appears very questionable, therefore, although cited by the Supreme Court in a recent decision,[9] for if the party in possession was in the position of a vendee he should have been permitted to remove the fixtures under the rule of the Waddingham case. He might also have had the right of removal if a tenant.[10]

Another limitation on the general principle of the right to fixtures as between vendor and vendee has been recognized where the vendor defaults in an oral contract. In such cases the vendee in possession has been protected.[11]

The principal case seems sound. There the vendee was not only in default but had also expressly agreed, as part of the consideration, to lay no claim to any improvements in case of default. He had, therefore, lost any equitable interest that he had while upholding his part of the agreement.

In the case of *Watterson v. Cruse*,[12] the Supreme Court of California held that the re-locator of a mining claim is entitled to all fixtures attached to the land at the time of the re-location. This appears to be the first decision on this point by a court of last resort. The leading text-writer[13] on mining law had formulated a rule to that effect, however, and was quoted by the court in support of its holding. There were numerous analogous decisions holding that wherever a claimant attaches fixtures to public land that he forfeits his right to remove them, and that

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[5] Supra, n. 4.
[6] (1897) 118 Cal. 635, 50 Pac. 683.
[7] Townley v. Bedwell (1808) 14 Ves. 591, 33 Eng. Rep. R. 648.
[8] Doe d. Tomes v. Chamberlaine (1839) 5 M. & W. 14, 151 Eng. Rep. 7.
[9] Watterson v. Cruse (Dec. 7, 1918) 56 Cal. Dec. 525, 176 Pac. 780.
[10] Hayes v. New York Gold Mining Co. (1874) 2 Colo. 273; 2 Ann. Cas. 738, n.
[11] Waters v. Reuben (1884) 16 Nebr. 99, 19 N. W. 687, 49 Am. Rep. 710.
[12] Supra, n. 9.
[13] Lindley on Mines (3d. ed.) § 409.

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a subsequent claimant who gets title to the land from the government gets all fixtures thereon.[14] Some cases do, however, allow removal before the claimant abandons his rights.[15]

That the equitable doctrine of Miller v. Waddingham has any application to fixtures on public lands appears doubtful. While the claimant has a possessory title which will be protected against all third parties so long as he performs his obligations, yet Miller v. Waddingham would not apply unless it were held that equitable conversion operates against the government. In the principal case the former locator had forfeited all rights before he attempted a removal, so the question of what his rights would have been before default did not require determination.

D. J. W.

PROPERTY: TERMINATION OF A TRUST: MEANING OF GIFT OVER TO "CHILDREN": ARE ADOPTED CHILDREN INCLUDED?—The decision in the case of *Fletcher v. Los Angeles Trust & Savings Bank*[1] is questionable. In this case, by the will of the testator, a trust fund was created and placed in the hands of a trustee who was to pay the net income therefrom to the testator's daughter, Annie K. Fletcher, "so long as she shall live" and "upon her death", the said fund with all accumulations therefrom, if any, were to be given to the "children of said Annie K. Fletcher to be equally divided among them by the said trustee share and share alike." Plaintiffs Mrs. A. K. Fletcher, the holder of the life estate, and her only child, Kimball Fletcher, brought this action to terminate the trust and to compel the trustee to pay over, assign and convey the trust fund to them. The judgment for plaintiffs was affirmed on appeal.

At the time of the trial of the action, Mrs. Fletcher was fifty-five years of age. Facts were established by the evidence in the case which negatived the possibility of birth of other children by her. Upon this evidence the court held that the remainder to Kimball Fletcher was vested. Two questions arise from this holding: (1) Was the remainder vested absolutely? (2) Should such evidence of physical impossibility be admitted to rebut the time-honored presumption of the law that there is possibility of issue until death?

A gift to a number of persons not named, but answering a general description, is a gift to them as a class. What persons constitute the class is to be ascertained when the time comes at which the gift takes effect.[2] Where the remainder is to

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[14] Hiatt v. Brooks (1885) 17 Nebr. 33, 22 N. W. 73; Collins v. Bartlett (1872) 44 Cal. 371; McKiernan v. Hesse (1877) 51 Cal. 594.

[15] McKiernan v. Hesse, supra, n. 15.

[1] (March 10, 1919) 28 Cal. App. Dec. 548.

[2] 73 Am. St. Rep. 413, note; In re Denlinger's Estate (1895) 170 Pa. St. 104, 32 Atl. 573; Cal. Civ. Code §§ 1336, 1337.

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the "children" of the life tenant as in the principal case, the gift will include all children who answer the description at the time of the death of the life tenant, when the precedent estate terminates, whether such children were born before or after the death of the testator.[3] The question follows whether, in a gift of a life estate with a remainder over, the remaindermen take vested or contingent interests? "Where there is a remainder to a class of persons, as to children, grandchildren, issue, or brothers and sisters, all the members of the class living at the time of testator's death . . . . take prima facie vested remainders; the benefit of the provision being, however, extended to others of the same class who afterwards come into being before the determination of the particular estate, the shares of those previously born being in that case proportionately diminished. Thus, in the case of a devise to A for life, and after his death to his children, all such children living at testator's death take a vested remainder, and likewise those afterwards born before the termination of A's life estate, though until one of such class is in being, the remainder is, of course, contingent".[4] This does not conflict with Civil Code section 694, but merely shows that while the remainder to Kimball Fletcher was vested at the death of the testator, it was not vested absolutely, but was subject to be opened and to let in those afterwards coming under the term of description, i. e., "children". His remainder was then defeasibly vested and would be divested *pro tanto* upon the birth of other "children."

The court assumed from the evidence that there could be no other children, and hence that the class was closed. This would seem to be an erroneous view. Gray in his excellent work on the Rule against Perpetuities says:[5] "In one class of cases, from the difficulty and delicacy of determining the question involved, the occurrence of a contingent event beyond the required limits will be considered as possible although it is physically impossible. For the purpose of applying the rule against perpetuities, both men and women are considered capable of having issue so long as they live." This was held by Sir Lloyd Kenyon in Jee v. Audley,[6] and his decision has never been questioned. In Sayer's

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[3] Ayton v. Ayton (1787) 1 Cox 327, 29 Eng. Rep. 1188; Teed v. Morton (1875) 60 N. Y. 504; Ridgeway v. Underwood (1873) 67 Ill. 419; Evans' Estate (1893) 155 Pa. St. 646, 26 Atl. 739; Kent v. Ch. of St. Michael (1892) 136 N. Y. 10, 32 Am. St. Rep. 693; Coggins v. Flythe (1893) 113 N. C. 102, 18 S. E. 96.

[4] 1 Tiffany Real Property 291; Shattuck v. Stedman (1824), 2 Pick. (Mass.) 467; Campbell v. Stokes (1894) 142 N. Y. 23, 36 N. E. 811; 73 Am. St. Rep. 413, note.

[5] At §§ 215, 215a, 376.

[6] 1 Cox 324, 29 Eng. Rep. R. 1186.

[6] 1 Cox 324, 29 Eng. Rep. 1186.

[7] L. R. 6 Eq. 319.

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Trusts[7] Malins V. C. followed Jee v. Audley.[8] In the latter case the court said, "I am desired to do in this case something which I do not feel myself at liberty to do, namely to suppose it impossible for persons in so advanced an age as John and Elizabeth Jee to have children (they were 70 years old); but if this can be done in one case it may in another, and it is a very dangerous experiment and introductive of the greatest inconvenience to give a latitude to such sort of conjecture." By the weight of authority, in matters relating to the character and devolution of estates, whether the rule against perpetuities is involved or not, there is a conclusive presumption of law that there is no limit during life to the possibility of issue, and that the question whether a particular person was in fact incapable of having issue when an instrument was made or took effect is not open to investigation.[9]

It is to be regretted that the court summarily rejected the contention that an adopted child falls under the description of "children" in a will, especially in view of the fact that the Supreme Court has declared in most general terms that an adopted child is a "child".[10] Under section 230 of the Civil Code it has been recently held that the relation of parent and child was established.[11] There is respectable authority in other states to the effect that adopted children for all purposes are regarded as "children." Some courts and some statutes make a distinction between the cases where the question arises between the person adopted and the adopting parent's estate, and where the question is whether an adopted child of a third person, as in the present case, is to be considered as a "child". The question is well worthy of careful consideration, and it may be doubted whether the present decision, in view of the fact that it cites no authorities and devotes no discussion to this interesting point, will be regarded as determinative of the construction of instruments giving interests to children where the rights of adopted children are involved.[12]

[8] In re Dawson (1888) L. R. 39 Ch. Div. 155; Stout v. Stout (1888) 44 N. J. Eq. 479, 15 Atl. 843; Flora v. Anderson (1895) 67 Fed. 182.

[9] Flora v. Anderson (1895) 67 Fed. 182, 183. Lord Coke says (Co. Litt. 28a): "But if a man giveth land to a man and his wife and to the heirs of their bodies and they live until each of them be an hundred years old and have no issue, yet do they continue tenant in tail, for that the law seeth no impossibility of having children."

[10] In re Estate of Wardell (1881) 57 Cal. 484, 491; Johnson's Appeal (1879) 88 Pa. St. 346, 30 L. R. A. (N. S.) 914, note.

[11] 6 California Law Review, 158, 159.

[12] Sewall v. Roberts (1874) 115 Mass. 262, 276; Warren v. Prescott (1892) 84 Me. 483, 24 Atl. 948, 17 L. R. A. 435, 30 Am. St. Rep. 370; Fisher v. Gardiner (1915) 183 Mich. 660, 150 N. W. 358; Wilder v. Wilder (1917) 102 Atl. 110 (Me.); Woodcock's Appeal (1907) 103 Me. 214, 68 Atl. 821, 125 Am. St. Rep. 291; Hartwell v. Tefft (1896) 19 R. I. 644, 35 Atl. 882; Re Newman (1888) 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146. Contra: In re Comassi (1895) 107 Cal. 1, 40 Pac. 15 (limited to effect of "issue" to work a revocation of a will.

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Finally the court holds that the trust may be terminated by decree with the consent of all parties in existence in whom the beneficiary rights in the trust are vested. If it be admitted that the interest in Kimball Fletcher is not vested absolutely, that there is a contingent remainder in those who may afterwards come under the term "children"; then all the parties in interest are not before the court. It is only when all the parties in interest are before a court, when each is *sui juris* and all join in the application, that a court of equity ever terminates a valid trust; even then it is discretionary on the part of the court.[13] If all the parties in interest are not before the court equity has no power to terminate the trust.[14] The court relies on the case of Eakle v. Ingram,[15] but fails to differentiate the case at bar from the principle of that case. In Eakle v. Ingram, we find a bare trustee, without any interest except that he might but for the decree have become entitled to compensation for services as trustee. This, of course, furnished no reason for the continuance of the trust.[16] The holder of the life estate had died, and the terms of the trust were therefore carried out to the letter. In the principal case, we have an active trust, the life tenant still lives, and the words of the trust "upon her death, I give, devise and bequeath the trust fund, ... to the children of said Annie K. Fletcher," clearly show the intent of the testator that the trust shall not terminate until the happening of that event. The courts respect the express provisions as to the duration of a trust, unless it is clearly shown that its purpose has been fully accomplished or rendered impossible of accomplishment.[17] They should be careful not to defeat any object of the trustor apparent from his declaration of the purposes of the trust. To this end the courts must decline to act

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[13] 2 Perry Trusts and Trustees § 920; Gray v. Union Trust Co. (1915) 171 Cal. 637, 641, 151 Pac. 275; Stone, Petitioner (1885) 138 Mass. 476, 479; Estate of Yates (1915) 170 Cal. 254, 149 Pac. 555; Godfrey v. Roberts (1903) 65 N. J. Eq. 323, 55 Atl. 353; May v. Walter's Executors (1906) 30 Ky. L. R. 59, 97 S. W. 423; In re Lewis' Estate (1911) 231 Pa. 60, 79 Atl. 921; Kimball v. Blanchard (1906) 101 Me. 383, 64 Atl. 645; Brandenburg v. Thorndike (1885) 139 Mass. 102, 104, 28 N. E. 575.

[14] Cal. Civ. Code § 2280; Brown v. Brown (1895) 97 Ga. 531, 25 S. E. 353; Williams v. Kidd (1915) 170 Cal. 631, 637, 644, 151 Pac. 1; Young v. Snow (1897) 167 Mass. 287, 45 N. E. 686; Cuthbert v. Chauvet (1893) 136 N. Y. 326, 32 N. E. 1088; 39 Cyc. 99.

[15] (1904) 142 Cal. 15, 75 Pac. 566.

[16] Slater v. Hurlbut (1888) 146 Mass. 308, 315, 15 N. E. 790; Eakle v. Ingram (1904) 142 Cal. 15, 75 Pac. 566; Armistead's Executors v. Hartt (1899) 97 Va. 316, 33 S. E. 616; Donaldson v. Allen (1904) 182 Mo. 626, 81 S. W. 1151; Tilton v. Davidson (1903) 98 Me. 55, 56 Atl. 215; Blake v. O'Neal (1908) 63 W. Va. 483, 61 S. E. 410; Sears v. Choate (1888) 146 Mass. 395, 397, 15 N. E. 786.

[17] Young v. Snow (1897) 167 Mass. 287, 45 N. E. 686; Kendall v. Gleason (1890) 152 Mass. 457, 25 N. E. 838; Hoffman v. New Eng. Trust Co. (1905) 187 Mass. 205, 72 N. E. 952; 2 Perry Trusts and Trustees, § 920; Prentice v. Hall (1871) 106 Mass. 595.

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when there are, or may be, persons interested in the trust who are not before the court, or if before it, not competent to act for themselves;[18] or where the trust remains an active trust;[19] or where, though all the parties are *sui juris* and consent, it yet is evidenced that the intention of the trustor, or some legislative policy, may be thwarted if the trust is not continued.[20]

M. H. V. G.

QUASI-CONTRACTS: BLOOD RELATIONSHIP: THE PRESUMPTION OF GRATUITOUS SERVICES BY RELATIVES.—Ordinarily, the law will imply a promise to pay for services rendered and accepted. The rule is founded upon a presumption and may be rebutted by proof of a special agreement to pay either a particular amount or in a particular manner; or by proof that the services were intended to be gratuitous, either as an express gift or under circumstances from which the law will raise the counter presumption that the services were not intended to be a charge against the party who was benefited thereby.[1] Among the several exceptions to the general rule are those cases of services rendered by members of a family, including near and distant relatives to a certain degree, connected either by consanguinity or affinity, who are residing under one roof.[2] In such cases the law will not imply a promise of compensation for certain services rendered; the reason being that there exists a domestic relationship, the incidents of which include an exchange of such gratuities.

Therefore, whenever this domestic or family relationship exists, the usual presumption of payment for services rendered is negatived. An examination of the authorities will show that the emphasis is put on this family relationship rather than on blood relationship.[3] It is clear that volunteer services may exist, as well between strangers as between blood relatives, but unless they are living together there should be no presumption of gratuities in either case.[4] Yet, in *Gopcovic v. Gopcovic*,[5] the court said: "Indeed, it may well be doubted whether the plaintiff's evidence, if uncontradicted, would have constituted a contract

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[18] Thurston, Petitioner (1891) 154 Mass. 596, 29 N. E. 53; Harris v. Harris (1903) 205 Pa. St. 460, 55 Atl. 30; In re Goodal (1885) 64 Wis. 210, 25 N. W. 30.

[19] Smith v. Smith (1897) 70 Mo. App. 448; Appeal of Watson (1889) 125 Pa. St. 340, 17 Atl. 426.

[20] Lent v. Howard (1882) 89 N. Y. 169; Carney v. Kain (1895) 40 W. Va. 758, 23 S. E. 650.

[1] Moulin v. Columbet (1863) 22 Cal. 508; Murdock v. Murdock (1857) 7 Cal. 511, 513.

[2] Page v. Page (1905) 73 N. H. 305, 61 Atl. 356, 6 Ann. Cas. 510; 133 Am. St. Rep. 250n.; Williams v. Williams (1902) 114 Wis. 79, 89 N. W. 835.

[3] Woodward, The Law of Quasi-Contracts, p. 84.

[4] Page v. Page (1905) 73 N. H. 305, 61 Atl. 356, 6 Ann. Cas. 510.

[5] (Dec. 27, 1918) 28 Cal. App. Dec. 31, 33, 178 Pac. 734, 736.

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between these parties, for where there is 'blood relationship' between the parties, it may well be inferred, in the absence of a direct understanding to the contrary, that pecuniary compensation was not expected by the one performing the services." The impression given by the use of the words "direct understanding" is that an express contract will be required. Is this true? Should this principle be extended so generally? Does the fact that people are related infer gratuities? A close relationship might be evidence of gratuity, but it would have to be considered along with the kind of service rendered and the other circumstances.

The statement of the court that pecuniary compensation is not expected by the one performing services where there is blood relationship certainly does not apply in the face of attendant circumstances where payment would ordinarily be presumed. Blood relationship in itself, in view of the modern tendency of relatives to shift for themselves, and away from the old relation of the family, should be but slight evidence, limited to a close degree of relationship or to the family relation. The real question is whether the parties intended to contract or not. In the case of parent and minor child the court's statement may apply quite generally; but here there is the family or domestic relationship, as well as the obligation attached to the relation. No implied contract would ever be raised to pay in such a case in the face of the duties required by the relation. Likewise, in the case of husband and wife[6] no presumption of payment for ordinary services rendered will be raised; not because of any blood relationship between them, for none exists, but because of the family relationship. It is clearly apparent in these cases that it is not a question of blood relationship at all. Between parent and minor child, husband and wife, there is something more than a mere family relationship. There is a duty required because of certain positive rules of law; because of the status which gives each the right to certain services from the other.

An examination of the decisions will reveal that the majority of cases in which the presumption of gratuities has been given effect have been between children and their parents or the representatives of the parent's estate.[7] It includes the case of services rendered by an adopted member of the household, or by a step-child.[8] In all these cases thus far mentioned it may be

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[6] Gjurich v. Fieg (1913) 164 Cal. 429, 432, 129 Pac. 464; Murdock v. Murdock (1857) 7 Cal. 511; Crane v. Derrick (1910) 157 Cal. 667, 109 Pac. 31; Lapworth v. Leach (1889) 79 Mich. 16, 44 N. W. 338; In re Cooper (1894) 27 N. Y. Supp. 425; Coons v. Coons (1907) 106 Va. 572, 56 S. E. 576.

[7] Woodward, Quasi-Contracts, p. 83; Curry v. Curry (1886) 114 Pa. St. 367, 7 Atl. 61; Horton's Appeal (1880) 94 Pa. St. 62.

[8] Andrus v. Foster (1845) 17 Vt. 556; Hogg v. Laster (1892) 56 Ark. 382, 19 S. W. 975; Martin v. Martin's Estate (1900) 108 Wis.

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said that there is truly a quasi-contractual relationship, in which the intention of the parties is entirely disregarded. The law is the same as to adults where the child continues after minority to live with its parents, that is, to board and reside with them, and to render and receive services. There is then no implied pecuniary obligation on either side;[9] although at this step the former positive obligations incidental to the relationship cease to exist. Likewise, the presumption which may be said to exist because of the continuation of the family relationship, may now be rebutted by facts and circumstances as well as an express agreement that they did not intend such services to be gratuitous. If the circumstances show that it must have been the expectation of both parties that he should receive compensation, a promise will be implied.[10] The nature of the service in such cases should be the deciding factor. The presumption of gratuities should not be applicable unless the services in question were such as are commonly rendered or are required as an incident of the family relationship. This view has, however, not been endorsed by any of the courts, though some authorities distinguish between services which are and those which are not of a personal nature.[11] The courts make a distinction between cases where the child has come of age, been away from home, supported himself and then returns upon the request of the parent; and those where the child has continued to live with the parent after arriving at age and has never had any other home.[12]

Beyond these relationships of parent and child, husband and wife, one passes from the quasi-contractual to the contractual basis in which the real intention of the parties is the essence of the transaction. Assuming that brothers and sisters, cousins, aunts and nieces, uncles and nephews are living together in a family group, it is even more necessary to look to the intention of the parties serving, before it can be said that the mere blood relationship will raise a presumption of mutual gratuities.[13] If they are not living together there should be no presumption whatever. It may be conceded that there can be no recovery for

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284, 84 N. W. 439; Fuller v. Fuller's Estate (1898) 21 Ind. App. 42, 51 N. E. 373; Neal v. Gilmore (1875) 79 Pa. St. 421; Holmes v. Waldron (1893) 85 Me. 312, 27 Atl. 176; Walker v. Taylor (1901) 28 Colo. 233, 64 Pac. 192; Graham v. Stanton (1901) 177 Mass. 321, 58 N. E. 1023.

[9] Friermuth v. Friermuth (1873) 46 Cal. 42, 45; Wall v. Wall (1896) 69 Ill. App. 389.

[10] Andrus v. Foster, supra, n. 8; Story v. Story (1891) 1 Ind. App. 284, 27 N. E. 573; Broderick v. Broderick (1886) 28 W. Va. 378; Price v. Price's Exr. (1897) 101 Ky. 28, 39 S. W. 429; Stafford v. Devereux (1895) 166 Pa. St. 277, 31 Atl. 87.

[11] Frailey Adm'r v. Thompson (1899) 20 Ky. L. Rep. 1179, 49 S. W. 13.

[12] Marion v. Farnan (1893) 68 Hun (N. Y.) 383, 22 N. Y. Supp. 946.

[13] Fuller v. Mowry (1893) 18 R. I. 424, 28 Atl. 606; Morrissey v. Faucett (1902) 28 Wash. 52, 68 Pac. 352.

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services rendered with no idea of remuneration,[14] that is, for the ordinary exchange of gratuities among those living in a family relationship; or for services rendered with an express assurance that there would be no charge therefor.[15] But the presumption of gratuitous services among those living in the family relation must be qualified to this extent, that if the circumstances in which the services are rendered are such as to show a reasonable and proper expectation that compensation is to be made, plaintiff will be entitled to recover even in the absence of an "express" contract.[16] This presumption should not be peculiar to blood relatives but should go back to the contractual intention. Is the service rendered something which exists in the ordinary family relationship or something the parties would intend to contract about? Whenever the contractual relation is established, dependent on the kind of services rendered, whether the parties be blood relatives or not, the contract should be given effect. Of course, the presumption of gratuities is more easily rebutted as the degree of relationship diminishes, but the argument is that it should not exist, as the authorities hold it does exist, in the case of aunts and nieces, brothers and sisters, and other close relatives.[17] Such relationships should not of themselves rebut the legal presumption of an implied contract arising from services rendered.

It is quite apparent, then, that certain persons living in a family relationship do certain things gratuitously. This is ordinarily confined to the pure family relation and services would be such as are ordinarily gratuities. Blood relationship is involved only because as a general rule those in the family relation are blood relatives, and a false conclusion, making a general application of the presumption of gratuities in all cases of blood relationship, has followed from this. It could not be said today that blood relatives ordinarly live in a family relationship, and, therefore, no presumption should exist from such proof alone.

M. H. V. G.

SALES: LIABILITY OF EATING HOUSE KEEPER FOR WHOLESOMENESS OF FOOD SERVED TO GUESTS.—Plaintiff, in the case of *Loucks v. Morley*,[1] suffered a violent and protracted illness alleged to have been induced by eating unwholesome rice pudding served to him while a guest at defendant Morley's restaurant. The plaintiff did not allege negligence on the part of defendant, but based

[14] Gomez v. Johnson (1899) 106 Ga. 513, 32 S. E. 600.

[15] Cochran v. Zachery (1908) 137 Ia. 585, 115 N. W. 486; Castle v. Edwards (1895) 63 Mo. App. 564; Swires v. Parsons (1843) 5 Watts and S. (Pa.) 357.

[16] Disbrow v. Durand (1892) 54 N. J. Law 343, 24 Atl. 545; Carpenter v. Weller (1878) 15 Hun (N. Y.) 134.

[17] Hurst v. Lane (1898) 105 Ga. 506, 31 S. E. 135; Riley v. Riley (1893) 38 W. Va. 283, 18 S. E. 569.

[1] (Feb. 4, 1919) 28 Cal. App. Dec. 236, 179 Pac. 529.

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his right of recovery on an implied warranty alleged to arise under section 1775 of the California Civil Code. The court, however, relying primarily on the leading case of Sheffer v. Willoughby[2] and a well-known American authority on innkeepers[3] which represent the prevailing view, found that the transaction between the guest and the restaurateur never constituted a sale; that there could therefore be no recovery on the theory of an implied warranty. A showing of negligence is necessary in such cases, according to this rule, to support an action. It was further held that even though the court were to admit that a sale took place, the plaintiff could not recover, for the only implied warranties recognized in California are those provided for in the Civil Code. Section 1775 was said to be the only provision applicable, and it provides for sales of food for domestic consumption only. A sale in a restaurant is not one for domestic use, the court found, so it falls outside the scope of the section.

Although the holding might have been based on an old statute and gradually extended by mistake, yet unquestionably it was early recognized in the common law that "in contracts for provisions it is always implied that they are wholesome, and if they be not, the same remedy (damages for deceit) may be had."[4] The modern law probably would not go so far, but does undoubtedly imply a warranty where the seller is a dealer disposing of food for immediate consumption.[5] It may be said that there must be reliance on the seller's skill and judgment in the selection of the food, but the mere fact of purchase of a dealer for immediate consumption is generally all that is required to assume such reliance.[6] The extent to which this principle has been carried may be seen in cases where retail dealers have been held liable for damages caused by unwholesome canned goods.[7] There is nothing unusual or inconsistent about this, however, for if the dealer is held to warrant at all, negligence or knowledge is immaterial, a warranty being an absolute liability.[8] Some courts

[2] (1896) 163 Ill. 518, 45 N. E. 253, 34 L. R. A. 464, where the defendant served an unwholesome oyster stew. Resting on the assumption that the transaction is not a sale, the general rule has been against an implied warranty and in favor of reasonable care only in respect to quality and preparation. See Valeri v. Pullman Co. (1914) 218 Fed. 519; Bigelow v. Maine Central R. R. Co. (1912) 110 Me. 105, 85 Atl. 396, 43 L. R. A. (N. S.) 627; Travis v. Louisville etc. R. R. Co. (1913) 183 Ala. 415, 62 So. 851; Merrill v. Hodson (1914) 88 Conn. 314, 91 Atl. 533.

[3] Beale, Innkeepers and Hotels, § 169.

[4] Williston, Sales, § 241, quoting 3 Bl. Comm. 165.

[5] Mechem, Sales, § 1356; 32 Harvard Law Review, 71; Nelson v. Armour Packing Co. (1905) 76 Ark. 352, 90 S. W. 288, 15 L. R. A. (N. S.) 884, n. 1; Wiedman v. Keller (1898) 171 Ill. 93, 49 N. E. 210. See also 2 California Law Review, 157.

[6] Williston, Sales, § 242. Massachusetts apparently requires proof of actual reliance on the seller's judgment. See Farrell v. Manhattan Market Co. (1908) 198 Mass. 271, 84 N. E. 481.

[7] Sloan v. F. W. Woolworth Co. (1915) 193 Ill. App. 620.

[8] Williston, Sales, § 237.

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and writers apparently overlook this fact.[9] There can be no middle ground, however, and a seller is liable either regardless of negligence or on the ordinary principles of negligence only.

That the transaction between host and guest at a modern eating house does under some conditions constitute a sale is established. In the first place, courts hold uniformly that the serving of game, liquors, and adulterated foods at eating houses of any kind violates statutes prohibiting the "sale" of such commodities.[10] Again, where one buys and pays for a definite portion, as in the case of á la carte orders, cafeteria service, etc., why should the question of whether a sale is effected depend upon the answer to the question, "Will you eat it here, or take it with you?" However the old case of Parker v. Flint[11] held that the restaurateur does not sell but "utters" his food. The Massachusetts court recently held that it could find no difference between the "liability of a retail dealer of meat for immediate consumption and a victualler who serves food to guests to be eaten forthwith at his own table. Every argument which supports liability of the former tends to establish liability of the latter with equal cogency. They appear to us to rest upon the same footing in principle."[12] One court, while recognizing the fact that the service of food in definite proportions may be a sale, refused to imply a warranty, upon the ground that no such warranty was implied against victuallers at common law, and that the principle should be curtailed rather than extended.[13] The Supreme Court of New York, however, has repeatedly held the transaction to be a sale with an implied warranty.[14] The Court of Appeals held that a druggist serving ice cream of his own make which contained a filth product, rendering the food poisonous, warranted the article sold (apparently as a manufacturer)

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[9] See Tavini v. Swift & Co. (1918) 105 Atl. 55 (Pa.). Also comment on this case in 3 Minnesota Law Review, 285.

[10] Commonwealth v. Worcester (1879) 126 Mass. 256, (intoxicants with meals); State v. Lotti (1900) 72 Vt. 115, 47 Atl. 392 (liquor with meals); Commonwealth v. Warren (1894) 160 Mass. 533, 36 N. E. 308 (impure milk served with meals); People v. Clair (1917) 221 N. Y. 108, 116 N. E. 868, L. R. A. 1917F, 766 (partridges served out of season); Commonwealth v. Phoenix Hotel Co. (1914) 157 Ky. 180, 162 S. W. 823 (quail served out of season); Commonwealth v. Miller (1890) 131 Pa. 118, 18 Atl. 938, 6 L. R. A. 633 (oleomargarine served with meals).

[11] (1701) 12 Mod. 254, 88 Eng. Rep. 1303.

[12] Friend v. Child's Hall Dining Co. (1918) 120 N. E. 407 (Mass.). See also 24 Yale Law Journal, 73; 32 Harvard Law Review, 71; 17 Michigan Law Review, 261.

[13] Valeri v. Pullman Co., supra, n. 2.

[14] Leahy v. Essex Co. (1914) 164 App. Div. 903, 148 N. Y. Supp. 1063 (unwholesome food procured at a lunch counter); Rinaldi v. Mohican Co. (1916) 171 App. Div. 814, 157 N. Y. Supp. 561 (tainted meat bought of butcher, but the case follows the restaurant cases, and points out that there is no distinction); Muller v. Childs Co. (1918) 185 App. Div. 881, 171 N. Y. Supp. 541 (restaurant case); Barrington v. Hotel Astor (1918) 184 App. Div. 317, 171 N. Y. Supp. 840 (meal procured at hotel).

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but reserved the question of a restaurateur.[15] There seems no distinction, between the two situations, however, and the Supreme Court afterwards held in the famous case of Barrington v. Hotel Astor[16] that a guest who became violently ill as a result of eating a portion of a service of kidney sauté which he discovered to contain a mutilated mouse upon looking into the dish for his second helping, was entitled to an action on the ground of an implied warranty.

If it were to be admitted that the transaction in question does not constitute a sale, still it does not follow as is frequently held, (and this seems to be the holding of the principal case), that a warranty could not attach. "The basis of implied warranty is justifiable reliance on the judgment or skill of the warrantor", and to hold a grocer who sells a sealed can of peas with no opportunity of examination while attaching no liability to the restaurant keeper who opens the can and serves the peas is clearly inconsistent. The question of pure food is so vital a matter of public policy that it should be enforced even though the warranty be held to attach to the contract for the privilege of consuming food.[17]

Some courts have reached the result of holding the server of food absolutely liable on the theory of a positive duty, and have gone farther than the cases based on a strict theory of warranty, for in the latter cases the seller is liable to the buyer only, while in the cases resting on the "positive duty" theory the seller has been held liable to all who may lawfully use the article. This class of cases extends the principle of Thomas v. Winchester[18] regarding things inherently dangerous. "'There is a tendency to include not only commodities whose very existence is fraught with danger to owner and public . . . . , but also those whose normal use would result with reasonable certainty, in personal harm to the user, if not properly made."[19] In this class have been included food, bottled drinks, soap, and drugs.[20] This absolute tort liability has been applied by other courts which have talked about negligence, although there was no allegation or proof of negligence.[21] Other courts overlooking the real

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[15] Race v. Krum (1918) 222 N. Y. 410, 118 N. E. 853.

[16] Supra, n. 14.

[17] Friend v. Child's Hall Dining Co., supra, n. 12; 27 Yale Law Journal, 1068. See also 32 Harvard Law Review, 71.

[18] Thomas v. Winchester (1852) 6 N. Y. 397, 57 Am. Dec. 455.

[19] 25 Yale Law Journal, 679.

[20] Parks v. Yost Pie Co. (1914) 93 Kans. 334, 144 Pac. 202, L. R. A. 1915C, 179 (food); Boyd v. Coca-Cola Bottling Works (1915) 132 Tenn. 23, 177 S. W. 80; and Jackson Coca-Cola Bottling Co. v. Chapman (1914) 106 Miss. 864, 64 So. 791 (bottled drinks—in the latter case a dead mouse was discovered after the contents had been drunk).

[21] Doyle v. Fuerst & Kraemer (1911) 129 La. 828, 56 So. 906, 40 L. R. A. (N. S.) 480, Ann. Cas. 1913B, 1110.

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basis of the decisions have cited the last group of cases as authorities for the negligence theory.[22]

The exploded and erroneous view of the nature of a pleading under the modern system, known as the "theory of the case" has given emphasis in cases in which guests have sought to hold victuallers for serving unwholesome or dangerous food. For example, the Supreme Court of Massachusetts allowed recovery on the theory of implied warranty in a case in which plaintiff was injured by "biting down hard" upon a stone served by defendant in a dish of beans,[23] and on the same day refused recovery on an allegation of negligence in a case in which plaintiff was served berries containing a small tack which caught in her throat.[24] Why, in these days when the forms of action are supposedly dead, a person should lose a case because of a surplus allegation of negligence it is hard to understand. This blind worship of the theory of a complaint has led to such great confusion, that a current writer summarizes the situation as follows: "Thus New York and Massachusetts seems fairly well settled on both theories, but otherwise the whole result is Biblical, authority for both sides upon either theory."[25] There seems after all to be little if any difference between a liability based upon an implied warranty and a positive duty based upon public policy. Both operate irrespective of negligence, and the same facts will support either. Peculiar as it may seem, however, the courts require privity for recovery in cases resting on the theory of warranty but not in those resting on the theory of tort liability. This distinction is questionable, although established, for warranty was originally a purely tort action.

While the holding of the principal case to the effect that the only warranties in California are those provided for in the Civil Code is correct;[26] yet according to the principles discussed above, its findings that there was no sale, that § 1775 was the only section involved, that it did not apply, and that plaintiff's only chance of recovery was upon a theory of warranty, are all extremely doubtful holdings.

There is some reason at least for holding that § 1775 should apply, for to interpret that section as applying to those transactions only where the food bought is carried home before being eaten, under the construction that "domestic use" refers to home use only, is a very strict interpretation.[27]

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[22] Pantaze v. West (1913) 7 Ala. App. 799, 61 So. 42; Greenwood Cafe v. Lovinggood (1916) 197 Ala. 34, 72 So. 354.

[23] Friend v. Child's Hall Dining Co., supra, n. 12.

[24] Ash v. Child's Hall Dining Co. (1918) 120 N. E. 396 (Mass.).

[25] 17 Michigan Law Review, 261, 264; Bark v. Dixon (1911), 115 Minn. 172, 131 N. W. 1078, Ann. Cas. 1912D, 775, holds that the same facts will support recovery on either theory.

[26] Cal. Civ. Code, § 1764; 2 California Law Review, 156; Browning v. McNear (1904) 145 Cal. 272, 78 Pac. 722.

[27] Such an interpretation of "domestic use" is at least not the only

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Section 1769 regulating the sale of goods of one's own manufacture might also apply. The court cites an old California case[28] taking a strict view, but "The word 'manufacturer' is given a wide meaning in the law of implied warranty. All sellers who produce the article which they sell are classed in this category—thus a grower of plants or seeds, and one who has bred horses or cattle are included."[29] New York courts have included the maker of ice cream and the restaurant keeper.[30] Section 1769 of the Civil Code is peculiar and hard to understand, however. After providing for an absolute liability for defects arising out of the process of manufacture, the legislature has added that there shall be liability also for the use of improper materials knowingly. This second provision may be so interpreted as practically to defeat the whole section, since most defects arise out of an improper use of materials, and to prove their use knowingly would be practically impossible.

D. J. W.

TORTS: TRESPASS BY ANIMALS UPON UNENCLOSED LANDS IN CALIFORNIA.—It was the rule at common law that the owner of animals was bound at his peril to keep them within his own close, and if they escaped and trespassed upon the land of another, the owner was liable in damages. Two recent decisions in the District Court of Appeal call attention to the intricate state of the California law on this subject. It was held in *Davis v. Blasingame*[1] that the common law rule prevails in Fresno County, and in *Montezuma Improvement Co. v. Simmerly et al.*[2] that the rule is not in force in Mendocino County. These cases are not opposed, the difference between them being due to the fact that there is no uniform law on the subject in California. To determine the law in any county, a special expedition through the uncharted wilderness of early local statutes is necessary.

Originally, the common law rule prevailed nowhere in the state. On April 13, 1850, the legislature adopted the common law of England "so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of the state of California" as the rule of decision in all courts.[3] But before that the legislature had passed an "Act concerning Lawful Fences, and Animals trespassing on Premises

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consistent view, for why can it not mean a sale to an individual for immediate consumption rather than to a dealer for resale? See Nelson v. Armour Packing Co., supra, n. 5.

[28] Corrio v. Lynch (1884) 65 Cal. 273, 3 Pac. 889.

[29] Williston, Sales, § 240.

[30] Race v. Krum, supra, n. 15; Barrington v. Hotel Astor, supra, n. 14.

[1] (Mar. 27, 1919) 28 Cal. App. Dec. 730.

[2] (Feb. 25, 1919) 28 Cal. App. Dec. 418.

[3] Cal. Stats. 1850, p. 219, Cal. Comp. Laws 1850-53, p. 186.

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lawfully enclosed"[4] and an "Act concerning Marks and Brands."[5] These, together with an "Act to regulate Rodeos"[6] and an "Act concerning Judges of the Plains"[7] were early held to have abrogated the common law rule in California.[8] This state of uniformity was short-lived. In 1856 the legislature passed an "Act concerning Hogs found Running at Large in the Counties of Marin, Sacramento, San Francisco, Alameda, Stanislaus, Yuba and Santa Clara"[9] which restored the common law rule as to these animals and these counties. It provided a means whereby hogs trespassing upon enclosed or unenclosed land might be taken up and sold to pay the damages. This act was amended many times in respect to the counties affected thereby[10] and in its final form it extended to the counties enumerated in the footnote.[11] In 1857 the legislature passed a similar act applicable to certain other counties and restricted to certain months in the year.[12] This was also amended freely[13] and finally extended to the counties set forth in the footnote.[14] It has been stated that these two acts were repealed by the general repeal of prior estray acts in the Estray Act of 1897.[15] But these are in no sense estray acts, for, despite their titles, they relate solely to acts of trespass, and it is very doubtful if the act of 1897 had this effect.

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[4] Cal. Stats. 1850, p. 131, Cal. Comp. Laws 1850-53, p. 793; supplemented by an act approved Mar. 31, 1855. Cal. Stats. 1855, p. 70.

[5] Cal. Stats. 1850, p. 214; repealed and reenacted by Cal. Stats. 1851, p. 411; Cal. Comp. Laws 1850-53, p. 236.

[6] Cal. Stats. 1851, p. 445, Cal. Comp. Laws 1850-53, p. 337; repealed as to Tulare Co. by Cal. Stats. 1855, p. 163.

[7] Cal. Stats. 1851, p. 515, Cal. Comp. Laws 1850-53, p. 866.

[8] Waters v. Moss, (1859) 12 Cal. 535, 73 Am. Dec. 561; Comerford v. Dupuy, (1861) 17 Cal. 308.

[9] Cal. Stats. 1856, p. 229.

[10] Cal. Stats. 1857, p. 54; Cal. Stats. 1858, p. 17; Cal. Stats. 1861, p. 465; Cal. Stats. 1862, p. 39; Cal. Stats. 1863, p. 57; Cal. Stats. 1863-4, p. 290; Cal. Stats. 1865-6, p. 537; Cal. Stats. 1867-8, p. 305. A mystifying statute was enacted in 1864 (Cal. Stats. 1863-4, p. 227) purporting to extend the scope of an act of April 21, 1863. There is no such act, and the obvious intent was to refer to the act of April 21, 1856 (supra, n. 9). But the counties to which it was thereby extended, together with some others, had all been brought within the scope of the act previously. It is doubtful if this act, which seems to be a piece of legislative inadvertence, has the effect of repealing previous amendments. If it has, it removes the force of the statute from San Luis Obispo, Los Angeles, Butte, Humboldt and Merced Counties and part of Klamath County.

[11] Calaveras, Monterey, Placer, Plumas, Lassen, San Joaquin, Yolo, San Mateo, Santa Cruz, Santa Barbara, San Bernardino, Tuolumne, Marin, San Francisco, Sacramento, Alameda, Stanislaus, Yuba, Santa Clara, Sutter (during the summer months) and parts of Klamath and Sierra.

[12] Cal. Stats. 1857, p. 106.

[13] Cal. Stats. 1858, p. 79; Cal. Stats. 1862, p. 85; Cal. Stats. 1863-4, p. 448; Cal. Stats. 1873-4, p. 518.

[14] Tehama, Colusa, Butte, Napa, El Dorado, Solano and parts of Modoc.

[15] Cal. Stats. 1897, p. 198. See Deering, General Laws, p. 564.

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In 1864 the legislature passed an "Act for the better Protection of the Agricultural Interests in certain Counties"[16] which, after various amendments,[17] extended to the counties of Solano, Marin and Sacramento and part of Mono County. This allowed the owner or tenant of unenclosed premises to take up "any horse, mare, mule, jack, jenny or horned cattle" found trespassing and doing damage thereon, and give him a lien on the animals for the payment of the damages thus incurred. It thus restored the common law rule as to the animals enumerated. In 1872 a similar act was passed[18] which, after being amended,[19] applied to the counties in the footnote.[20] In the same year a former act[21] relative to Santa Clara County was so amended[22] as to restore the common law rule to that county..[23] At the same session, entry by animals on unenclosed land in Santa Barbara and San Luis Obispo Counties was declared a trespass, but the damages were limited to ten cents a head where the trespass was without the act or connivance of the owner of the animals.[24] This act was extended to parts of Butte[25] and Calaveras[26] Counties. In 1874 a statute restoring the common law rule was adopted for Yolo County,[27] and in 1876 a similar one was adopted for San Diego County.[28] Somewhat similar acts were passed for Colusa,[29] Tehama,[30] El Dorado,[31] and San Bernardino[32] Counties, which were later superseded by the act

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[16] Cal. Stats. 1863-4; p. 170.

[17] Cal. Stats. 1863-4, p. 532; Cal. Stats. 1865-6, p. 443; Cal. Stats. 1865-6, p. 311; Cal. Stats. 1865-6, p. 440; Cal. Stats. 1867-8, p. 456; Cal. Stats. 1871-2, p. 412; Cal. Stats. 1873-4, p. 391; Cal. Stats. 1873-4, p. 845; Cal. Stats. 1875-6, p. 5.

[18] Cal. Stats. 1871-2, p. 99.

[19] Cal. Stats. 1871-2, p. 241; Cal. Stats. 1871-2, p. 510; Cal. Stats. 1871-2, p. 566; Cal. Stats. 1873-4, p. 190.

[20] San Francisco, San Mateo, Alameda, Yolo, Contra Costa, Marin, Napa, Merced, San Joaquin, Solano, Los Angeles and San Diego. Certain counties were allowed the right to adopt the act by vote, and the same right was extended to the townships of San Bernardino County. Marin and Solano were already covered by the act of 1864 (as reenacted by Cal. Stats. 1865-6, p. 440), and as to them the former act was doubtless repealed.

[21] Cal. Stats. 1863, p. 581.

[22] Cal. Stats. 1871-2, p. 580.

[23] Hahn v. Garratt, (1886) 69 Cal. 146, 16 Pac. 329.

[24] Cal. Stats. 1871-2, p. 749. Provisions of this act as to these counties were superseded by the act of 1873-4, infra, n. 33.

[25] Cal. Stats. 1873-4, p. 310; Cal. Stats. 1875-6, p. 314.

[26] Cal. Stats. 1873-4, p. 579; Cal. Stats. 1875-6, p. 901.

[27] Cal. Stats. 1873-4, p. 343. This supersedes the act of 1872 (supra, n. 18) as to Yolo County.

[28] Cal. Stats. 1875-6, p. 459. Superseding the act of 1872 (supra, n. 18) as to San Diego County.

[29] Cal. Stats. 1871-2, p. 685; Cal. Stats. 1873-4, p. 760.

[30] Cal. Stats. 1873-4, p. 853; Cal. Stats. 1875-6, p. 643.

[31] Cal. Stats. 1875-6, p. 356.

[32] Cal. Stats. 1875-6, p. 307.

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of 1878. By an act of 1874[33] provision similar to that made by the act of 1864[34] was made for Fresno, Tulare, Kern, Ventura, Santa Barbara, San Luis Obispo and Monterey Counties. It was extended at the same session to Inyo,[35] Napa,[36] and San Benito[37] Counties. In 1878 an act was passed providing: "It is unlawful for any animal . . . . to enter upon any land owned by or lawfully in the possession of any person other than the owner of such animal" in the counties of Colusa, Humboldt, Merced, Solano, Santa Barbara, San Joaquin, San Luis Obispo and Sacramento, and parts of Tehama, San Bernardino and El Dorado Counties.[38] It was extended by amendment to Alpine and Los Angeles[39] and to Sutter.[40] After this orgy of legislation, no further acts were passed until 1907. Then a general law, the first since 1850, went into effect, making it unlawful "for any person . . . . owning . . . . any animal, to suffer or permit such animal to break into or enter upon any land owned by . . . . any person . . . . in all cases where such land is planted to growing crops, vines, fruit trees or vegetables, and is at the time entirely enclosed by a substantial fence or other enclosure."[41]

How much of this legislation is in force today? It was held in Hanley v. Sixteen Horses, etc.[42] that the act of 1878 repealed by implication the act of 1874. This case arose in Santa Barbara County, one of the two counties covered by both acts, and as to that county the provisions of the former act were doubtless repealed. But how about the counties covered by the first act and not by the second? To hold that the first act was repealed in its entirety would greatly simplify matters, for the principle would apply as well to every other act on the subject back to 1864. But it seems impossible, considering the great amount of local legislation then on the statute books, to imply from the enactment of one special law an intention to repeal others except in so far as they referred to the same localities. While the language of the Hanley case is general, it is probably to be carried no further than was necessary for the actual decision. If otherwise, the case of Davis v. Blasingame[43] is wrong, for it depends upon the law of 1874.[44] Taking this view of the Hanley case, we find, at the close of the

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[33] Cal. Stats. 1873-4, p. 50. Triscony v. Brandenstein, (1885) 66 Cal. 514, 6 Pac. 384.
[34] Supra, n. 16.
[35] Cal. Stats. 1873-4, p. 824.
[36] Cal. Stats. 1873-4, p. 705.
[37] Cal. Stats. 1873-4, p. 475.
[38] Cal. Stats. 1877-8, p. 176.
[39] Cal. Stats. 1877-8, p. 878.
[40] Cal. Stats. 1907, p. 300.
[41] Cal. Stats. 1907, p. 999.
[42] (1893) 97 Cal. 182, 32 Pac. 10.
[43] Supra, n. 1.
[44] Supra, n. 33.

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legislation of 1878, the common law rule concerning animal trespass in force in thirty-three counties.[45] The early laws relating to trespass by hogs are quite generally superseded by the more general laws, but remain unrepealed in some localities.[46]

This being the state of the law up to 1907, what was the effect of the general law of that year?[47] It was strenuously argued that its effect was to repeal the act of 1878 and all similar acts, and so take away the right of recovery for trespass upon unfenced lands throughout the state. But it was held in Blevins v. Mullally[48] that the law was not repugnant to the prior local laws and did not operate to repeal them. So interpreted, the law of 1907 loses most of its effect, as in the only localities to which it applies the old Fence Law of 1850 was still in force.

A. R. R.

WORKMEN'S COMPENSATION ACT: POWER OF EQUITY TO ENJOIN EXECUTION ON AWARD.—In *Gamble v. Superior Court*[1] it was held that the superior court had jurisdiction to enjoin execution of an award of the Industrial Accident Commission against a corporation, secured by the wife of one of its employees. Plaintiff based his right to relief on a contract by which the wife had sold him stock in the corporation and had agreed as part of the bargain not to apply for an award on account of her husband's death.

It may be conceded that the legislature did not intend by § 67 (d) of the Workmen's Compensation Act[2] to deprive an innocent third party of all protection from an unjust levy on his property nor deny him a remedy in an appropriate case. But that is quite different from enjoining execution on the award altogether. To grant the injunction in the principal case would

[45] In Colusa, Humboldt, Merced, Solano, Santa Barbara, San Joaquin, San Luis Obispo, Sacramento, Alpine, Los Angeles, Sutter and parts of Tehama, San Bernardino, and El Dorado the law includes all animals. In Fresno, Tulare, Kern, Ventura, Monterey, Inyo, Napa, San Benito, Yolo, San Diego, Santa Clara, San Francisco, San Mateo, Alameda, Contra Costa, Marin, and parts of Butte and Calaveras it includes any horse, mare, mule, jack, jenny, sheep, goat, hog, or any horned cattle. In the two counties last named there is only a limited liability. In part of Modoc County, which is the only territory remaining subject to the act of 1864, the law covers only horses, mules, burros and cattle.

[46] Territory covered by the act of 1856 (supra, notes 9 and 10) and not by the later acts, includes Placer, Plumas, Lassen, Santa Cruz, Tuolumne, Stanislaus, Yuba, and parts of Calaveras, San Bernardino, Klamath and Sierra. Territory covered by the act of 1867 (supra, notes 12 and 13) and not by the later acts, includes parts of Modoc, Tehama, Butte and El Dorado.

[47] Supra, n. 41.

[48] (1913) 22 Cal. App. 519, 135 Pac. 307. Accord, Hicks v. Butterworth (1916) 30 Cal. App. 562, 159 Pac. 224.

[1] (Feb. 10, 1919) 28 Cal. App. Dec. 291, 179 Pac. 717.

[2] Cal. Stats. 1917, chap. 586, § 67 (d), p. 876.

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be to compel specific performance of the contract. The beneficiary would, because of this contract, be prevented from claiming an award which she would otherwise be entitled to enforce. It would, in effect, operate as a release or settlement of her claim, and for an amount less than that given by the Workmen's Compensation Act.

Our statute specifically provides the manner in which a release of a claim for compensation may be made,[3] and the Supreme Court of this state has held that a release made in any other manner is invalid.[4] This is in accord with decisions elsewhere, which hold that attempted settlements or releases of claims to compensation must strictly comply with the statutes or they will be of no validity.[5] It has been declared to be contrary to the policy of these statutes to allow the employer by private contract with the employee to exempt himself from liability, and contracts attempting to do this do not constitute a defense to an award.[6] The approval by the Commission of a settlement does not divest it of jurisdiction nor deprive it of supervisory powers necessarily left open by the agreement,[7] and it may thereafter stop, diminish, or increase the compensation according to the law and facts of the case.[8] If its approval has been procured by fraud or mistake the commission may revoke it and proceed to make an award.[9] Where the release does not give full compensation as provided by the act, it is not regarded as complete and though it may have been formally approved by the commission, the latter may proceed to hear the parties and award the balance of the compensation just as if the aggrement had not been made.[10]

Our statute provides that "no release of liability or compromise agreement shall be valid unless it provide for the payment of full compensation in accordance with the provisions of this act or unless it shall be approved by the commission,[11]

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[3] Cal. Stats. 1917, chap. 586, § 27, p. 855.

[4] Mass. Bonding and Ins. Co. v. Industrial Accident Commission of Calif. (1917) 176 Cal. 488, 168 Pac. 1050. Employe's Credit Co. v. Industrial Acc. Commission (1917) 169 Pac. 1001 (Cal.).

[5] Shaffer v. D'Arcy Spring Co. (1917) 165 N. W. 825 (Mich.) Rodarmel v. Carey Salt Co. (1917) 101 Kas. 141, 165 Pac. 668; Dettloff v. Hammond Standish & Co. (1917) 195 Mich 117, 161 N. W. 949; Brabon v. Gladwin Light and Power Co. (1918) 167 N. W. 1024 (Mich.). Adams v. W. E. Wood Co. (1918) 169 N. W. 845 (Mich.).

[6] Chicago Rys. Co. v. Industrial Board of Ill. (1916) 276 Ill. 112, 114 N. E. 534; Wabash Ry. Co. v. Industrial Commission (1918) 121 N. E. 569 (Ill.).

[7] Foley v. Detroit United Ry. (1916) 190 Mich. 507, 157 N. W. 45.

[8] Winn v. Adjustable Table Co. (1916) 193 Mich. 127, 159 N. W. 372.

[9] Aetna Life Ins. Co. v. Shivley (1918) 121 N. E. 50 (Ind.); Weathers v. Kansas City Bridge Co. (1917) 99 Kas. 632, 162 Pac. 957; Green v. Buick Motor Co. (1918) 166 N. W. 1028 (Mich.).

[10] In re Stone (1917) 117 N. E. 669 (Ind.); Standard Cabinet Mfg. Co. v. Iliff (1918) 119 N. E. 479 (Ind.).

[11] Cal. Stats. 1917, chap. 386, § 27, p. 855.

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and the court has held that as between the parties this means exactly what it says.[12] It is difficult to see how the intervention of a third party could change the rule. On what principle should the stockholder be allowed to procure the release of the corporation's liability in a manner which the corporation could not itself? The evident intent of the statutes, and the courts have so interpreted them, is to secure compensation to the beneficiary. It would seem that a contract like the one in the principal case should constitute no bar at all to proceedings to secure the award, without necessity for considering whether the facts are present which ordinarily give equity jurisdiction to grant an injunction.

P. S. M.

[12] Supra, n. 4.

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Book Reviews

A MANUAL ON LAND REGISTRATION. By Arthur Gray Powell, LL. D. The Harrison Company, Atlanta, Ga. 1917, pp. xv, 449.

It is interesting to observe that although the draft of the Uniform Act prepared by the National Commissioners on Uniform Laws was before the Georgia commission and legislature it was not followed closely in the Torrens Law as passed in 1917. It is evident that land registration is far from being in a condition for uniform codification. There are two novel features in the Georgia Act: (1) By a simple proceeding the owner of a registered title is enabled to free it from registration, to de-Torrenize it, as it were. The owner is thus able to say to a purchaser: "If you don't like a registered title I will give you the other kind." (2) The holder of a duplicate certificate may take it at any time to the registrar's office and have all changes on the original noted on the duplicate. This enables a seller to show his title up to a period subsequent to the issuance of the certificate. It is doubtful whether this will facilitate land transfers to any great extent. In practice the question of title plays a small part in the negotiations; some method of determining the title is prescribed by law or by the parties and the actual discussion then turns on price, interest, loans and other business details. The author states: "The transactions which are likely to arise in the life of a land title are multiform. In the history of a land title we find it affected by deaths, marriages, trusts, disabilities, by odd and unusual provisions inserted by the whim of some eccentric owner, by debts, liens, encumbrances, tax sales and what not. A system which does not provide for all these things and provide for them in an understandable way is not likely to work smoothly in its earlier days." On the same page we find a statement that "Certificates for registered lands are as negotiable as bank stock or other legal securities." How certificates for registered land can be negotiable in the face of all the transactions which are likely to arise in the life of a land title is beyond the comprehension of the reviewer. The only way that warehouse receipts, bills of lading, and stock certificates have been made negotiable has been to provide that no attachment or other lien shall be valid unless the certificate itself is seized. To make certificates for registered lands negotiable it would be necessary to have a similar provision and no execution, attachment, mechanics' lien, judgment lien, etc., etc., should be held valid unless possession be taken of the outstanding duplicate certificate for the land.

The supplement contains the text of the Georgia Act with comment and citations from the reports of other states, and also the text and annotations of the American Uniform Act. As all land registration acts in the United States are more or less

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alike, the discussion of the author will be valuable to practitioners outside the state of Georgia, for it contains the suggestions of the able author, one of the most distinguished of contemporary judges when he was a member of the Georgia Court of Appeals.

A. M. Kidd.

THE PROCESSES OF HISTORY. By Frederick J. Teggart. New Haven, Yale University Press. 1918. pp. IX, 162.

"Science is not a body of beliefs and opinions, but is "the orderly and systematic effort to find out" (p. 162). The problem of human history is, as the author many times states it, to explain "how man everywhere has come to be as he is". Is history, then, in its usual sense, a science? And do historians follow a scientific method? In Professor Teggart's opinion historians have not fully utilized our vast accumulation of information regarding men's past activities and experiences, nor used this material scientifically, because they have assumed "that such an explanation would be afforded by a statement, in the form of a narrative, of what had happened in the past", exaggerating the dramatic method "of depicting personal character revealing itself in the stress of critical circumstances". What is wanted is not naive story-telling, but analytical studies—of the history of morals, of freedom, sea power, class struggles, religious revivals (35, 36, 105), and other individual conceptions, factors or institutions; utilizing for "the study of man" all the studies heretofore carried on in illogical isolation by anthropology, history, geography, art, literature, religion, philology, politics, and economics (106, 159, 160). It is with the facts of history in this broad sense that he undertakes to deal. He accepts as "the minimal unit of history" "the continental mass of the Old World taken as a whole, and throughout the time occupied by the generations of men" (37, 43); and aims at results "of direct service in the consideration of human affairs" (123). He cautions us, however, that "while we are gradually escaping from the dominance of narrative we have not as yet acquired the width of outlook necessary for the pursuit of analysis on a truly humanistic basis"(36).

Now "the undertaking in which" humanistic studies "are one and all engaged is the attempt to determine how the idea-systems of men have come to be as we find them today" (160). Professor Teggart necessarily rejects, therefore, as inadequate the study of the mere forms of human organization, and insists throughout that the problem is one of intellectual development.

The resolution to be "scientific" with which Mr. Teggart approaches his subject is impressive. The theory that geography is an absolute determinant of human types, the discredited conceptions of race-constants, physical and psychical, and the theory of economic determinism, are rejected as inadequate explana-

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tions of the development of idea-systems; although anthropogeographic and economic evidence is reasonably utilized in his own argument. His own basic methodological assumptions are, "the specific identity of the brain", the constancy of human reasoning, and the "psychic unity" of mankind (134-37). The fundamental problems of history in natural science are to account for the factors working respectively for fixity, for slow modification, and for "change" (127), and on the other hand to include phylogenesis, ontogenesis, and the facts of geographical distribution (104); therefore these distinctions are made the framework of his own argument (130, 155). The fundamental steps in his argument are (1) the distinction between kinship and political societies; (2) the theory of the idea-system; (3) the influence of geography in breaking down kinship groups, advancing "politicization", and disintegrating idea-systems; and (4) the resultant release of individual thought and energy. The author, however, does not develop these clearly and analytically. An adequate examination of any one of them would more than exhaust the space available for a book review. The first alone may be analyzed by way of illustration.

Mr. Teggart repeatedly contrasts kindred and political organization (96, 79, 80), but, inasmuch as "the distinction between kindred and political units may readily be defined" (84), he does not dwell upon it. In view of its importance in his theory, this is surely a pity. Thus, he quotes Maine's statement that social history reveals no other revolution "so startling and complete as the change which is accomplished when some other principle (than kinship), such as that, for instance, of local contiguity, established itself for the first time as the basis of common political action" (81)—it will be noted that Maine does *not* make kinship and political organizations mutually exclusive! And he regards this transition as "the only satisfactory approach to the study of History" (83), though it later appears that "the central feature of transition is not the substitution of territory for blood-relationship . . . . , but the emergence of individuality and of personal assertion" (98). Of course, Mr. Teggart could not, in a short book, attempt more than to clarify the statement of the problem; but in view of his opinion that "there is some step or process involved in the transition which neither Maine nor Morgan has brought to light" (84), and that no sustained effort has ever been made to investigate it (83), it is regrettable that his own discussion does not even clarify it.

He starts with Morgan's statement that, unlike kindred societies, "political society is organized upon territorial areas, and deals with property as well as with persons through territorial relations" (83).

Doubtless Maine's generalization contained a great truth; and there is some truth in Morgan's—but its general usefulness

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is questionable. Not to go outside of Mr. Teggart's own book, he himself expressly states that the boundaries between primitive groups "are in general clearly defined, not merely by the natural landmarks . . . . but even by artificial monuments", and are jealously defended (61). Yet such groups Mr. Teggart constantly characterizes as kindred groups! We have, then, government and law dealing *with* the inhabitants of a district, but (assumedly) *as* members of a kindred group. Is such a kinship society "organized upon" a territorial basis? As respects, next, the second part of Morgan's generalization, take regal Rome and early medieval Europe. Mr. Teggart would certainly classify regal Rome as a "political" society. Now, the law of regal Rome was a territorial law in one sense—Roman citizens enjoyed, and peregrins did not, the benefits of the *jus civile*; but was this geographical fact cause or result of membership in a Roman *familia*? What was the theory of Caracalla's edict? Concretely, the law of family and inheritance rested on agnatic relationship; then, when this law was enforced, were Roman citizens and peregrins *really* dealt with on a territorial, or on a kinship, basis?

Again, Mr. Teggart says that "the fundamental characteristic of political organization is the attitude of personal ownership assumed by the ruler towards the land and the population over which he has gained control—an attitude expressed to this day (does he believe there is a historical relation?) in the phrase 'my army' and 'my people'" (88). The history of landed property in Western Europe in the early medieval period would to some extent support this statement. But, on the other hand, what about the property powers of the Roman *paterfamilias*? Again, Mr. Teggart's theory would lead one to assume that there was no "political" organization among the early Germanic tribes before the territorial replaced the racial principle of allegiance, and that medieval Germanic society "dealt with" persons territorially; the first assumption would require fundamental reservations and explanations, and as regards the second, the law, at least, long applied its rules through kinship. Finally, some attention should be given to communal ownership among the early Germanic tribes, and among primitive peoples. Mr. Teggart probably drew his generalization from non-Eurasian ethnological literature; but, on the whole, it is probable that evidence to support it could be found more readily and abundantly if "kindred" were substituted for "political". This as regards land. As respects other forms of property—for surely all should be considered before accepting a distinction as to one (assuming it to be established) as a test of "political" organization—such forms are very numerous in primitive tribes; including even incorporeal "property."

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Mr. Teggart, to be sure, cautions us that "political organization has been but imperfectly extended over the population of the areas where it is dominant, and . . . . 'survivals' of the earlier regime are to be found even in the most highly developed countries" (79), there being "practically no case on record in which the population has been wholly incorporated into the political organization or in which the kindred organization has been completely broken down" (94). All difficulties are avoidable, of course, in this manner, and this is another characteristic of the book; every argument is bafflingly equivocal.

These examples must suffice. The difficulties in Mr. Teggart's elaboration of the third topic above indicated are even greater than those indicated in connection with the first. The book deal with fascinating questions, and shows a scholar's range of reading, but it is ill arranged, lacks sharp analysis, definiteness, and coherence, and is further marred by inconsistencies and large assumptions.

F. S. Philbrick.

Books Received

CONFLICT OF LAWS RELATING TO BILLS AND NOTES, THE. By Ernest G. Lorenzen. Yale University Press, New Haven, Conn. 1919. pp. 337.

EQUITY. AN ANALYSIS OF MODERN EQUITY PROBLEMS DESIGNED PRIMARILY FOR STUDENTS. By George L. Clark. E. W. Stephens Publishing Co., Columbia, Mo. 1919. pp. lii, 639.

SOURCE BOOK OF MILITARY LAW AND WAR-TIME LEGISLATION PREPARED BY THE WAR DEPARTMENT COMMITTEE ON EDUCATION AND SPECIAL TRAINING. Colonel John H. Wigmore, Supervising editor. 1919. West Publishing Co., St. Paul, Minn. pp. xviiifi 858.

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California Law Review

VOL. VII SEPTEMBER, 1919 Number 6

The Relation Existing Between Irrigation Water Users and Distributing Companies With Special Reference to Rights Arising Out of Contract

(CONTINUED FROM JULY ISSUE)

IV.

THE question as to whether a water right is a property interest in the plant is not only a very difficult one, but at the same time a very important one for the reason that fees for "water rights" have been so universally charged by distributing companies. These fees have been paid in exchange usually for a perpetual right to receive water, not for water actually received. Since the constitution compels service by making the distribution of water a public service, the question is presented: what is a water right? What can it give to the consumer that the law has not already given him? The only answer seems to be that it gives him an actual property right, a real interest in the pipes, ditches and distributing plant. At least this is the theory that the courts have adopted and it is reflected in practice—if it did not originate there—in the custom of converting stock companies into mutual companies by exchange of water rights for shares. Many contracts include a clause providing for such a transfer, on the theory that when water rights have been sold to all the area for which the water was appropriated, the distributor steps out and the consumers find themselves the joint owners of the system.

Many practical arguments have been advanced in favor of this system. Perhaps the strongest of these is that mentioned above, namely, that it is being successfully operated to the satisfaction of all parties concerned, with little speculation as to its legal aspects. Another strong argument for the general plan

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is to be found in the irrigation district projects in which the national or state governments have acted as benevolent distributors, furnishing part or all of the capital necessary to get the area under irrigation, but with the ultimate intention of removing their capital and leaving the irrigators the owners of their own water system.

Mr. Wiel suggests a financial argument[87] to the effect that charges for water rights are necessary in order to induce companies to go into a business which, under the thumb of public control, and lacking in a profit on the building of the system, would be too precarious to interest capital. There seems some question as to the validity of this reasoning, for it ignores the facts that the company having its capital invested in the property of the system, continues to own the same, and the profit on the building of the system is yielded when the system is sold, as it may be at any time.

Moreover there is an argument of public policy against allowing the company to plan on stepping out of the business by selling out all the water rights in its system. The sale of each water right means the removal of that much of its capital and it means the reduction, to just that extent, of the incentive to serve diligently. The law provides for forfeiture of the franchise[88] because of certain violations of the company's public duties. The fear of such a forfeiture will decrease proportionately with the decrease in the amount of the capital jeopardized, and in the same ratio will decrease the probability of good service.

From the legal point of view the validity of easements becomes questionable only when the laws of public service are applied to the distribution of water. There is no inherent reason why a water right should not be an appurtenance or easement to certain land. On the contrary, the most natural situation would be for the water right to attach to land, as in the common law theory of riparian rights, which attaches the highest importance to the geographical position of land, with the advantage in favor of upper owners. Public service recognizes no such principle; its fundamental tenets are equality of right by reason of status alone. The two theories conflict and public service must

[87] Supra, n. 19, Vol. II, p. 1232.
[88] Act of 1885, supra, n. 9.

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control because the constitution has so provided.[89] The question then arises: Do such "easements" or "water rights" create discrimination so as to be invalid?

Colorado has definitely adopted the view that they are not invalid—a result which would be expected from her theory of the identification of the consumer with the original appropriator on the stream. But she has recognized the public service requirement and insured its effectiveness by forbidding water companies to make a charge for such a "water right."[90] Idaho has practically followed the example of Colorado in this matter,[91] and the general tendency among the Western States may be said to be in the direction of recognizing these easements, though not to the extent of making valid contract charges for water rights as conditions precedent to service.[92] Perhaps the true situation in the Western States, stated in general terms, is something as follows: Through the increase in development of water by mutual companies and irrigation district projects the validity as well as the importance of water rights is becoming more and more firmly established as a legal conception growing out of the successful practical administration of water rights; but when the doctrine has come into conflict with the rigidity of public service principles, it has yielded for the simple reason that the public service principles rested in most instances upon a firmer foundation, namely, the constitution.

Turning now to the law of California, cases and statutes are found to be in the same confusion that characterizes other branches of our water law. The Federal courts have taken an active part in making the law on this subject. Their earlier decisions were based upon strict adherence to the public utility

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[89] Supra, n. 5.

[90] Colo. Laws, 1887, p. 308.

[91] Idaho Laws, 1899, p. 380, § 20; Nampa & Meridian Irrigation District v. Gess (1910) 17 Idaho 552, 106 Pac. 993; Idaho Rev. Codes, § 3292; Childs v. Neitzel, supra, n. 43; State v. Twin Falls Canal Co. (1912) 21 Idaho 410, 121 Pac. 1039.

[92] Colorado: Wheeler v. No. Colo. Irrigation Co. (1888) 10 Colo. 582, 17 Pac. 487; Dickson v. Dick (1915) 59 Colo. 583, 151 Pac. 441. Idaho: Wilterding v. Green (1896) 4 Idaho 773, 45 Pac. 134; Boise City Irrigation Land Co. v. Clark, supra, n. 65; Green v. Byers (1909) 16 Idaho 178, 101 Pac. 79; Hanes v. Idaho Irrigation Co. (1912) 21 Idaho 512, 122 Pac. 859. Arizona: Gould v. Maricopa Canal Co., supra, n. 63; Salt River Valley Canal Co. v. Nelssen (1906) 10 Ariz. 9, 85 Pac. 117. Texas: Hartford Fire Insurance Co. v. City of Houston (1908) Tex. Civ. App. 110 S. W. 973; Texas, Rev. Stats. 1895, Art. 3125. Nebraska: Fenton v. Tri-State Land Co., supra, n. 45.

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theory by which charges for water rights as conditions of service were not recognized, and the possibility of attaching to the land a greater easement of water service than the constitution already gave it was in effect denied; this, for example, was the view in the case of San Diego Land & Town Company v. City of National City[93] (1896). This case was affirmed by the Supreme Court,[94] although the water right question did not seem to be much in issue. In the same year Lanning v. Osborne[95] contained a *dictum* to the same effect. Two years later the rule was announced in Mandell v. San Diego Land and Town Company.[96] In the case of Souther v. San Diego Flume Company (not reported) the right of a water company to exact any sum of money or other thing, in addition to the legally established rates, as a condition upon which it should furnish water to consumers, was denied by the Circuit Court, but on appeal the authority of the Park case was recognized as controlling. This decision of the Circuit Court of Appeals was reaffirmed after a rehearing in 1900.[97] There was another decision in 1903, but the point was not discussed or involved.[98] In San Diego Land and Town Company v. Jasper,[99] decided by the Circuit Court in 1901, the court felt bound by the holdings in the Park case and the Souther case and recognized the validity of the water right charge. But it is to be noticed that the court, while following the Park and Souther cases, did so reluctantly. Judge Ross criticises the Park case, saying that it did not stand for the broad proposition that a water right charge is legal, for the reason that it was not shown that the water was appropriated under the constitution of 1879, and the inference was that the appropriation antedated that constitution.

On the other hand the State Supreme Court consistently recognized water rights up to 1909. Price v. Riverside Land and Irrigation Company[100] (1880) contains language indicating that

[93] Supra, n. 23.
[94] San Diego Land and Town Co. v. National City (1899) 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804.
[95] Supra, n. 23, affirmed (1900) 178 U. S. 22, 44 L. Ed. 961, 20 Sup. Ct. Rep. 860.
[96] Supra, n. 23.
[97] San Diego Flume Co. v. Souther (1898) 90 Fed. 164, 32 C. C. A. 548; (1900) 104 Fed. 706, 44 C. C. A. 143; (1901) 112 Fed. 228.
[98] Souther v. San Diego Flume Co. (1903) 121 Fed. 34, 57 C. C. A. 561.
[99] (1901) 110 Fed. 702.
[100] Supra, n. 16.

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the court interpreted section 552 of the Civil Code[101] literally. Fudickar v. East Riverside Irrigation District (1895)[102] recognizes the right of a contract to grant "a continuous flow of water on certain land." In spite of Judge Ross' criticism,[103] the case of Fresno Canal Company v. Park[104] seems distinctly to assert and sustain the right of an appropriator of water for sale, rental, or distribution under the constitution of 1879 and subsequent statutes, to exact a sum of money or other thing in addition to the legally established rates as a condition on which water so appropriated will be furnished to consumers. In that case it is said: "Property and ownership in these ditches . . . . were as deeply founded and as thoroughly established in the law as property in any other thing capable of ownership . . . . in 1878," and it was pointed out that the constitution did not change the situation except as to the cities.

In Hildreth v. Montecito Water Company[105] (1903) the Supreme Court of the State drew a distinction between the rights of consumers from a water company and members of a mutual company, showing that in the first instance they do not "possess rights to waters which are, in the ordinary sense, private property," whereas in the second case, "their respective water rights will remain private property, even though such persons form a corporation as their agent to distribute and keep the system in repair." The District Court of Appeals in 1906 dismissed the appeal in an action for the recovery of $37.00 for water sold and delivered, though the contention was made by appellant that a real property right was involved.[106] These two cases are not directly in point, but are mentioned to show that they constitute the nearest approach to an exception to the consistency of holding in the State courts mentioned above.

Three cases[107] in 1908 approve the water right or easement,

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[101] Which provides: "Whenever any corporation organized under the laws of this state, furnishes water to irrigate lands which said corporation has sold, the right to the flow and use of said water is, and shall remain a perpetual easement to the land so sold . . . ."

[102] Fudickar v. East Riverside Irrigation District (1895) 109 Cal. 29, 41 Pac. 1024.

[103] Supra, p.

[104] Supra, n. 18.

[105] (1903) 139 Cal. 22, 72 Pac. 395.

[106] Hesperia Land & Water Co. v. Gardner (1906) 4 Cal. App. 357, 88 Pac. 286.

[107] City of South Pasadena v. Pasadena Land & Water Co. (1908) 152 Cal. 579, 93 Pac. 490; Graham v. Pasadena Land & Water Co. (1908) 152 Cal. 596, 93 Pac. 498; Orcutt v. Pasadena Land & Water Co. (1908) 152 Cal. 599, 93 Pac. 497.

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although they have reference to the supply of water in cities. Stanislaus Water Company v. Bachman[108] was a precise holding in the matter of "water rights" or "easements." Its approval of such rights was unqualified and it appears from the language of Mr. Justice Shaw, who rendered the opinion, that the rule was of general application, for he mentions the fact that the terms of the contract in litigation were prevalent throughout the San Joaquin Valley. In that case it is said: "The constitutional provision was not intended to prevent a land owner from acquiring and attaching to his land a right to the permanent use of water for its irrigation;" also "permanent rights to the use of water for irrigation may still be obtained by contract, notwithstanding the provisions of the constitution, subject only to the condition that the State may, if it chooses to do so, regulate and control the use."

Strong as this decision appears to have been, and compulsory as it seems to have been warranted by the earlier cases, it was overruled the next year in the case of Leavitt v. Lassen Irrigation Company,[109] where it is said: "If it be conceived that section 552 of the Civil Code is designed to confer upon any particular consumer any special permanent and preferential right above what is here stated, that effort, being plainly violative of the constitution, would be void." An attempt is made to distinguish Stanislaus Water Company v. Bachman[110] and other cases. The net result, however, is that the rule laid down in the Leavitt case constitutes the present law in this State, and in general terms it is thus stated in that case: "Attempted reservation of a private right out of a public trust . . . . would be futile and void."

The cases since Leavitt v. Lassen Irrigation Company[111] have not been entirely in harmony, and although the case has not been overruled, the Supreme Court of the State has shown a disposition substantially to approve water rights, although taking pains to distinguish the fact so as not to violate the principle.[112] The most striking example of this inclination is to be seen in the case of Thayer v. California Development Company.[113] In that case an

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[108] Supra, n. 21.
[109] Supra, n. 32.
[110] Supra, n. 21.
[111] Supra, n. 32.
[112] Copeland v. Fairview Land & Water Co. (1913) 165 Cal. 148, 131 Pac. 119.
[113] (1912) 164 Cal. 117, 128 Pac. 21, 25.

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owner of land in a district of the Imperial Valley for the irrigation of which the defendant company had appropriated water from the Colorado River, filed a petition seeking to compel the defendant to serve the land with water on tender of the established rate, but without paying the charge for a water right. The court refused to grant the petition on the grounds that defendant was not a public service company, for "where an irrigation company which appropriated water from a river to irrigate a named county, organized subsidiary corporations for the purchase of land in that territory, and transferred to them perpetual water rights for the irrigation of land owned by them, there was no dedication of the water right to public use; the essential feature of a public use being that it shall not be confined to privileged individuals, but open to the indefinite public while in this case not every land owner could use water." The case does not violate the rule of Leavitt v. Lassen Irrigation Company,[114] but the reasoning argues that because the company has by its own contracts and regulations created privileges for favored individuals, therefore it cannot be a public service corporation, is not wholly convincing. In other words, the reasoning is not stronger than the implied premise, which is that the creation of the privileges was legally justifiable in the first instance, and the question may justly be asked, was not this very proposition the one which the case should have decided instead of assuming it as a fact?

Practically the same facts as in the last case were presented to the Federal Court in the same year (1912)[115] when the water right charges of one of the other subsidiary corporations in the Imperial Valley was in litigation. The Federal Court decided the case in very definite terms in a manner which rendered the net result exactly opposite to that reached by the Supreme Court of the State, that is: "that a contract between complainant and such a local corporation by which the latter agreed that complainant should have all of its capital stock with the right to sell the same to settlers at such prices as it might fix and keep the proceeds, the effect of which was to enable complainant to charge settlers for water rights to their lands was void for want of con-

[114] Supra, n. 32.

[115] Imperial Valley Water Co. v. Holabird (1912) 197 Fed. 4, 116 C. C. A. 526.

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sideration." In this case Judge Morrow, who rendered the opinion, said:[116]

> "This leaves us to find the consideration for the so-called water right which the complainant claims to have acquired by the delivery through a Mexican Company of the water required to irrigate the lands to be settled upon by the stockholders of the defendant corporation. Is this a consideration that the law will recognize? We think not. In this case the land to be irrigated was not occupied, and the water right did not attach. When that time should arrive, the water right would attach to the land by operation of law, and not by virtue of the contract entered into between the complainant and the defendant. The complainant would have no water right to convey. There was, therefore, no consideration for the contract. We are fully advised as to the fact that voluntary contracts for the purchase of water rights from canal companies, whose works had been completed and were in operation, have been sustained by the courts in this State, but such cases must be carefully considered in the light of the facts of the particular case."

The attitude of the Supreme Court of California had not changed in the case of Franscioni v. Soledad Land and Water Company (1915)[117] in which a water right was held to have been acquired under section 552 of the Civil Code.

It seems clear that the Legislature intended that easements of this sort should be created. In the act of 1897[118] amendatory of the act of 1885,[119] it is said: "Nothing in this act contained shall be construed to prohibit or invalidate any contract already made, or which shall hereafter be made, by or with any of the persons, companies, associations or corporations . . . . relating to . . . . the sale or rental of easements and servitudes of the right to the flow and use of water . . . ." Section 552 of the Civil Code provides: "Whenever any corporation, organized under the laws of this State, furnishes water to irrigate lands which said corporation has sold, the right to the flow and use of said water is and shall remain a perpetual easement to the land so sold."

The question arises, what is the effect of these legislative utterances? Probably their operation is qualified, as suggested in the case of Leavitt v. Lassen Irrigation Company;[120] that is

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[116] Supra, n. 115, p. 15.
[117] (1915) 170 Cal. 221, 149 Pac. 161.
[118] Cal. Stats. 1907, p. 49.
[119] Supra, n. 9.
[120] Supra, n. 32.

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to say: they are only operative in so far as they do not conflict with the constitutional guarantee that the distribution of water shall remain a public use, and the courts will decide in the individual cases that arise, to what extent there is conflict as to those cases.

The question of the legality of charges for water rights or initiation fees has been discussed to some extent above in the consideration of the validity of the rights themselves. Looked at on principle it is difficult to escape the conclusion that such charges are illegal. The constitution provides for public service; public service means compulsory service and that without discrimination. The only possibility of weakness in the reasoning is that suggested by Mr. Wiel,[121] namely, whether the recognition of private estate in the natural source of supply is necessarily prohibited by the law of public service. This raises an interesting and difficult question, for if one can regard public ownership as an extension of public service, as he suggests, there is good ground for doubting the illegality of initiation fees. As a purely abstract conception it is sound to think of an irrigated area in which water rights have been completely sold to the individual consumers, and they have been left the owners of the system. The difficulty is that in practice this ideal situation would seldom if ever be reached except on the basis of a mutual development scheme. With the company that starts as a public service company there are too many conflicting interests to make possible that co-operation which is the back-bone of mutual company enterprises. The public service company can never be relieved of any of its duties to its customers or to any of those who contemplate becoming customers; it must serve all who make demand. Therefore, since the constitution gives to consumers the right to service without payment of an initiation fee, the only inducement there could be for paying such a fee would be the interest in the distributing system. In so far as such an interest was proprietary, it would be burdened with the same duties of public service; in so far as it gave to its owner rights other than proprietary, to that same extent would it discriminate against those who had not seen fit to pay more than the constitution required. From whatever angle the problem is approached the final and convincing argument against the legality of initiation

[121] Supra, n. 19, Vol. II, p. 1230.

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fees is that the constitution on the one hand compels the company to serve and on the other does not authorize the exaction of anything more than a reasonable rental charge.

In further support of the invalidity of initiation fees may be noted various indications tending to show that public policy does not favor them. For example, in Colorado, where the theory is definitely accepted that the consumer is in the same situation as the original appropriator, the legislature has guarded against the natural result of the theory by prohibiting such charges.[122] The same is true of Idaho.[123]

In recent decisions on the point,[124] the Supreme Court of the United States upheld the Supreme Court of California in the principle that the company retains title to the system and cannot exact a charge for a water right, thus reversing the Circuit Court of Appeals, which had held contra. Decisions of the California Railroad Commission also held that initiation fees are illegal in this State.[125]

There are arguments on the other side, not the least of which is the one based on public ownership, the advantages of which (in the sense in which the expression is here used) are apparent in the mutual companies. Recognizing the desirable feature of this mode of development by irrigation, and appreciating the success which it has actually experienced, it seems a narrow and arbitrary rule that declares that simply because a certain area was first irrigated by a water company, it is condemned always to be so irrigated and never to change to a more advantageous form. The argument might proceed a step further in the direction of socialism and say that the technical rights of the individual should be sacrificed to the good of the community without going further than we already go in our policy of eminent domain, for example. There is much force in the contention that the progress and welfare of a community should not be governed by its least progressive and least public spirited member.

Another attack which is made upon the public service doctrine

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[122] Supra, n. 90.

[123] Idaho, Laws, supra, n. 91.

[124] San Joaquin & Kings River Canal & Irrigation Co. v. Stanislaus County (1914) 233 U. S. 454, 58 L. Ed. 1041, 34 Sup. Ct. Rep. 652. It is to be added, however, that Mr. Blanchard's paper was written in April, 1916.

[125] Application of Murray and Fletcher (1915) 7 Cal. R. R. Com'n Dec. 334; Sac. V. R. Co. v. Sac. V. W. Side C. Co. (1915) 7 Cal. R. R. Com'n Dec. 113.

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is based upon the frequency of unfortunate cases. The over sanguine development company which promised more than it could perform in order to induce development, and later, through public rate fixing and antagonism born of unsatisfactory service, has been forced out of business to the detriment of all concerned, is an exhibit under this line of argument. Another bit of evidence which is frequently presented in support of water right charges is the undeniable fact that they have been almost universally charged and collected as a matter of practice, without disastrous results. This argument is, of course, dependent for its force upon supplementary showings, such, for example, as that the initiation fees have been used for other purposes than simply to swell dividends on the capital stock.

Taking all of these arguments into consideration and with due regard for the dignity of decided cases, the better opinion would declare initiation fees unjustifiable as well as illegal. The most rapid progress in development is seldom the best. The personal rights of the American people as guaranteed by their constitutions are not to be infringed for any ordinary reasons. The time may come in the future when public ownership will be well enough established as a principle of political economy to justify a modification, or, as Mr. Wiel suggests, an extension of our theory of public service. At the present the reasons are not sufficient for changing the law of public service which has dominated the question in California, and laid it down as a legal rule that charges for initiation or water right fees are illegal.

V.

From the above analysis of rights which may and those which may not arise out of contract, it may be said in general that in California water contracts may give rights in every instance where they do not conflict with the laws of public service as announced by the courts and the legislature. Public service rights exist irrespective of contract,[126] for they vest in the individual consumer by reason of his status as a member of the class, for whose benefit the water has been appropriated.[127] Contract rights and public service rights are concurrent and enforced by

[126] Spring Valley Water Co. v. San Francisco (1881) 61 Cal. 3.

[127] Hildreth v. Montecito Water Co., supra, n. 105; Mahoney v. American L. & W. Co. (1905) 2 Cal. App. 185, 83 Pac. 267; Leavitt v. Lassen Irrigation Co., supra, n. 32.

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different forms of remedy: specific performance[128] and action for breach of contract[129] are the remedies for the first class of rights, mandamus[130] and tort action for the second. Although the purpose of this paper is primarily a discussion of contract rights, there are several phases of public service prohibition against discrimination which should be mentioned, inasmuch as they so frequently limit the rights which contracts seek to establish.

Among the public service requirements should be mentioned that of equality of rates, regardless of cost, of any individual service. It is obvious that an irrigator taking water from the canal at a great distance from the source can not be supplied at the same cost to the company as a consumer located close to the source. If the rates are to be equal, the consumers near the source must contribute to pay a part of the cost of serving the less fortunately located land. Is it right that they should be compelled to make this contribution, for which they receive no value in return? On the other hand, if the rates are to be made on the basis of the actual cost of service, the distant irrigator could not afford to pay the exorbitant rates. The laws of public service are very definite in deciding this question on the grounds of public policy. In Niday v. Barker[131] it is said: "We do not apprehend that rental charges for the use of water from irrigating canals are based upon the actual expense of carriage and delivery to each individual consumer. . . . This is not the theory on which water rates are established." On the other hand, Boise City Irrigation Company v. Turner[132] sanctions unequal rates in so far as they are created by contracts made before the constitution took effect. There is a *dictum* in the case, however, to the effect that as to contracts made after the constitution no variation in rates would be lawful. In California

[128] Clyne v. Benicia Water Co. (1893) 100 Cal. 310, 34 Pac. 714.

[129] Crow v. San Joaquin Water Co., supra, n. 20.

[130] San Diego Water Co. v. San Diego (1897) 118 Cal. 556, 50 Pac. 633, 62 Am. St. Rep. 261, 38 L. R. A. 460; San Diego Land & Town Co. v. Jasper, supra, n. 29; Osborne v. San Diego Land & Town Co. (1900) 178 U. S. 22, 44 L. Ed. 961, 20 Sup. Ct. Rep. 860; but in City of South Pasadena v. Pasadena Land & Water Co., supra, n. 107; Graham v. Pasadena Land & Water Co., supra, n. 107 and Orcutt v. Pasadena Land & Water Co., supra, n. 107, there appears to be authority for granting mandamus to enforce a contract right.

[131] (1909) 16 Idaho 73, 101 Pac. 254; Lanning v. Osborne, supra, n. 23, is in accord.

[132] Supra, n. 65.

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the law requires that the rates be equal,[133] except as between different classes of users;[134] that is, the rate fixed for water to be used for mining purposes may be different from the irrigation rate, but each individual using water for irrigation is entitled to the same rate as every other irrigator. A case tried in the Supreme Court of Alabama[135] has gone to the extent of sanctioning a slight discrimination in rate where it appeared that the rate charged to the other consumers was reasonable; but this case does not state the law, at least in the Western States, and the theory of such a holding is distinctly at variance with the fundamental principles of public service. A good answer is to be found in the language used in an Idaho case:[136] "Nothing can be clearer than that the supplying of any portion of the land under the system at anything less than the regularly established rate adds to the burden of the other land which is thereby called upon to make good just compensation for the use of the property."

In a Maryland case[137] it is said that a public service corporation such as a water supply company cannot be required to extend its plant into additional territory, when the revenue from such service will not pay the cost of extension and maintenance of the service, and the corporation has not funds to pay therefor, and cannot sell bonds for that purpose, so that an order of the public service commission requiring it to make such extension is unreasonable. But the Supreme Court of California has recently held[138] that mandamus will lie to compel a water company to extend its service where there is a reasonable necessity therefor, and that the cost to the company of such extension is not a controlling feature in determining the reasonableness of a demand, which is a question of fact to be decided by the court in each particular

[133] Mandell v. San Diego Land & Town Co., supra, n. 23; Fellows v. City of Los Angeles (1907) 151 Cal. 52, 90 Pac. 137 and Act of 1885, supra, n. 9.

[134] Lanning v. Osborne, supra, n. 23, but the Act of 1880, Cal. Stats. 1880, p. 16, forbids control over the use of water after delivery.

[135] State ex rel Ferguson v. Birmingham W. W. Co. (1910) 164 Ala. 586, 51 So. 354.

[136] Boise City Irrigation & Land Co. v. Clark, supra n. 65.

[137] Public Service Com'n of Md. v. Brooklyn & C. B. Light & Water Co. (1914) 122 Md. 612, 90 Atl. 89.

[138] Lukrawka v. Spring Valley Water Co. (1915) 169 Cal. 318, 146 Pac. 640.

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case. This decision supports the attitude of the Railroad Commission of the State.[139]

Another proposition, well established by the principles of the law of public service, is that there can be no priorities in service among consumers, and such is the law in California.[140] In other Western States, as will be pointed out later, the doctrine, however, has been modified. The question most frequently arises in the event of a shortage in the water supply, when its decision becomes of primary importance; for if priorities of service are permitted, then consumers are entitled to service in the order of their priority, each receiving his full quota of water before the next lower in the scale receives any water at all; whereas, if priorities are not recognized, all must prorate in time of drought. It is conceivable that prorating may, in some instances, operate to prevent any consumers from receiving enough water to be of any practical value for irrigation. This was actually the case during the years 1900 to 1905 in the district supplied by the San Diego Land and Town Company. During that period of protracted drought many citrus orchards died out and almost the only ones that survived were those irrigated by means of private pumping plants. Such a situation is impressive, yet it must be remembered that it is the extreme and unusual case, and further that absolute equality of service has many economic as well as legal advantages. Its simplicity facilitates practical administration and minimizes costly litigation, and the assurance it offers to new irrigators tends to stimulate development in a dry country. The dangers it affords for speculative and over-optimistic development should be considered in connection with the discouraging prospect to the new irrigator which the priority system offers.

On the one hand, Idaho is an example of the successful operation of the principle of priorities, while on the other, California demonstrates the practicability of prorating, so it may be that in seeking to determine the superiority of one system over the other the question is more academic than real.

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[139] Warren v. Murphy Water, Ice and Light Co. (1914) 4 Cal. R. R. Com'n Dec. 1238; but see Ferrasci v. Empire Water Co. (1915) 6 Cal. R. R. Com'n Dec. 309, "as previously decided by the commission, no utility should be compelled to extend its service unless such extension could be accomplished so as not to work injury to consumers at present receiving satisfactory service."

[140] Byington v. Sacramento Valley West Side Canal Co. (1915) 170 Cal. 124, 148 Pac. 791.

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Turning to the California cases, the decisions seem to be uniform. The broadest statement of the principle is, perhaps, that contained in Leavitt v. Lassen Irrigation Company:[141] "The fundamental and all important proposition, then, is this, that a public service water company which is appropriating water under the constitution of 1879, for purposes of rental, distribution and sale, cannot confer upon a consumer any preferential right to the use of any part of its water." Other cases which announce the same rule, though in less comprehensive language, are Lassen Irrigation Company v. Long,[142] Rickey v. East Redlands Company,[143] Lowe v. Yolo, etc., Company[144] and the two decisions in Souther v. San Diego Flume Company,[145] where it is stated that prorating is generally recognized.

The only limitation on the doctrine of prorating is the normal capacity of the system; that is, all who apply and tender the rate must be served up to the time when the system is supplying all those for whom it has facilities. Among these consumers all shortages must be prorated, but those receiving water in times of excessive supply establish their rights only as to the excess, and cannot claim any water to the detriment of the regular consumers. The company must not undertake to supply water beyond its capacity, and an injunction may be granted to prevent it.[146] This, of course, prevents the company from reducing the service of present consumers in order to take on new customers,[147] and, as said in San Diego Land and Town Company v. Sharp,[148] (by the lower court the decision of which was affirmed): "A consumer whose land is situated within the flow of such a distributing system as that of this company, and who has, by means of water thereby supplied to him, made valuable improvements on his land, cannot be thereafter lawfully deprived of such water in order that the distributor may supply later comers, even though a larger area, by reason of more

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[141] Supra, n. 32.
[142] (1909) 157 Cal. 94, 106 Pac. 409.
[143] (1903) 141 Cal. 221, 74 Pac. 754.
[144] (1908) 8 Cal. App. 167, 96 Pac. 379; (1910) 157 Cal. 503, 108 Pac. 297.
[145] Supra, n. 97, 98.
[146] McDermont v. Anaheim, etc., Co. (1899) 124 Cal. 112, 56 Pac. 779; Lanning v. Osborne, supra, n. 23; Souther v. San Diego Flume Co. (1901) 112 Fed. 228.
[147] Hildreth v. Montecito Water Co., supra, n. 105.
[148] Supra, n. 23.

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favorable conditions, may thus be brought under cultivation. Such a rule would manifestly work destruction to the just and well-established rule that in cases like this, the first in time is the first in right."

In Colorado the previously mentioned theory of regarding the consumer from the company as an appropriator, would logically operate to give him the same priority in supply which he would obtain by appropriation, and there is authority for the statement that such has actually been the result.[149] In spite of the fact that prorating stipulations in contracts are held to be valid as waivers of priorities,[150] yet the statute of 1879,[151] providing for prorating in times of shortage, has not received the sanction of the courts, but seems rather to be regarded as unconstitutional.[152]

The attitude of Idaho and Arizona is similar to that of Colorado and opposed to California. Although Idaho recognizes that the consumer may voluntarily waive his priority by contract with the company,[153] yet, in the absence of such waiver, prior rights to service will be enforced.[154] In Guber v. Nampa and Meridian Irrigation District,[155] the court said, on rehearing, referring to its former decision, which it appoved on this point: "As we read this decision, it construes sections 4 and 5 of Article 15 of the constitution as creating a priority among consumers from a canal analogous to that which exists among appropriators from a natural stream. . . . . 'The rights of the prior appropriator must at all times be recognized and in an action to compel the owners of a canal to furnish water to such subsequent applicant, the canal company can only be compelled to furnish the water so dedicated by such applicant—that is the water applied to a beneficial use by him when not made by the prior appropriator

[149] Farmers, etc., Co. v. Southworth (1889) 13 Colo. 111, 21 Pac. 1028; Farmers, etc., Co. v. White (1903) 32 Colo. 114, 75 Pac. 415; City and County of Denver v. Brown, supra, n. 40.

[150] O'Neil v. Fort Lyon Canal Co. (1907) 39 Colo. 487, 90 Pac. 849.

[151] Colo. Laws, 1879, p. 97, § 4.

[152] Cases cited in n. 149, supra; also Nichols v. McIntosh (1893) 19 Colo. 22, 34 Pac. 278.

[153] Jackson v. Indian, etc., Co. (1909) 16 Idaho 430, 101 Pac. 814 and (1910) 18 Idaho 513, 110 Pac. 251; Creer v. Bancroft, etc., Co. (1907) 13 Idaho 407, 90 Pac. 228.

[154] Farmers' Co. v. Riverside Irrigation District (1908) 14 Idaho 450, 94 Pac. 761; Brose v. Board of Directors of Nampa and Meridian Irrigation District, supra, n. 44.

[155] (1911) 19 Idaho 765, 116 Pac. 104.

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thereof.'" Arizona fully recognizes priorities among consumers;[156] also Nebraska in a more limited sense.[157]

VI.

An attempt has been made above to indicate what the law is on the subjects discussed. In such an investigation the tendency is too often to lose sight of the fact that the cases which make the law are in almost every instance brought into the court to try the actual rights of persons and not for the purpose of vindicating abstract legal views nor of furnishing the courts with material for academic discussion. Where the logical application of rules of law works manifest injustice, it is plain that there is something the matter with the rule. On the other hand, the law on any subject must be broad enough to cover variant cases and is not to be changed simply because a hard case occasionally arises. Looked at from this point of view, and recognizing that law and justice are substantially synonymous terms, it will be seen that the law can never be static, but must admit of sufficient modification to meet changing conditions of the practical world. In apparent conflict with this view is the forceful argument that security and uniformity are of greater importance in the law than minute justice, since if one knows what the law is today and that it will be the same tomorrow, he may govern his acts in safe reliance upon that law, even though in so doing he may sacrifice some rights to which, by natural justice, he would seem entitled. The theory is that such minor sacrifices are preferable to a system by which every person acts at the peril of his own judgment as to his rights. Rigid adherence to such a view commits one to the proposition that only the legislature can change the law. Theoretically such a conception may be sound, but as a practical solution of the difficulty it is far from satisfactory; so many considerations enter into almost every case that the simple application of statutory rules would not be enough. There are three ingredients which must be blended in the proper proportions to make the net result serve the purpose for which law was created. The first of these is the body of the law as it

[156] Hargrave v. Hall (1891) 3 Ariz. 252, 73 Pac. 400; Slosser v. Salt River, Etc., Co. (1901) 7 Ariz. 376, 65 Pac. 332; Gould v. Maricopa, Etc., Co. (1904) 8 Ariz. 429, 76 Pac. 598; Salt River, Etc., Co. v. Nelssen (1906) 10 Ariz. 9, 85 Pac. 117.

[157] Fenton v. Tri-State Land Co., supra, n. 45.

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exists; the second is the legislature and the third is sound judicial wisdom. The three are compensatory and mutually restrictive.

Testing the results which have been obtained in California on the broader ground of justice and public satisfaction, it is worthy of notice that the courts have in general taken an enlightened view of their function in administering the fundamental principles of public service, to which the constitution has committed water companies, but with due regard for the special circumstances which have from time to time demanded adjustments and modifications as to details. The federal courts have, perhaps, been less inclined to feel their way in making such adjustments than the Supreme Court of the State, and they have, apparently, considered more carefully the practical application of their decisions. Speaking generally, legislatures have shown a commendable willingness to furnish the compensating feature, which is their function, but their endeavors sometimes remind one of that passage in Browning's Rabbi Ben Ezra: "What I aspired to be and was not, comforts me."

In the earliest history of California as a State, public opinion, not unnaturally, considered rapidity of development as the most important end, and any means which served that end were favored. At that time, it may be noticed, practically complete freedom of contract was permitted, the only restriction worthy of mention being one against excessive rates, usually in the form of a provision for public rate fixing. The adoption of the constitution of 1879 marked not only the crystallization of a growing tendency toward restriction upon public distribution of water, but it initiated an era of rigid regulation of water companies, putting upon them all of the burdens of public service without attempting to give them the benefit of special circumstances and conditions which distinguished them in certain instances from absolute public service companies. The severity of this public sentiment was reflected in the holdings of the federal courts and even the Supreme Court of the State to the effect that no contract made by a water company could be binding. But before the legislature attempted to correct this arbitrary application of a legal rule, the courts themselves recognized that it was impracticable and sought to draw reasonable distinctions where circumstances justified departure.

Following the period of strictness there was a period of re-

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action expressed in the statutes of 1897, 1901 and others. At this time the courts were again called upon to make reasonable the application of legislative ardor which had then swung from its previous position of severity to the water companies to one of extreme leniency. The laws of public service which it had previously been necessary to distinguish, were later invoked to show the general principles to which the State had, by its constitution, been committed.

Much time could be spent in pointing out in detail the operation of the compensatory development of the law, and perhaps, just as much time in citing instances where the theory seems not to have applied. To the writer it seems that in spite of the few exceptions which cannot be denied, the feature of the steady development of the law in accordance with practical demands, is, if not the most impressive, at least the most interesting feature of an examination of the statutes and the cases.

The only question which remains for consideration in this paper is to determine what in general are the characteristics of the present era. There are certain indicia which cannot be overlooked. They represent a conflict of theories as to water distribution. On the one hand the railroad commission has proceeded in the matter of public regulation to questions so minute and detailed,[158] that it may well be asked if the distributing company has been left with any discretion at all in the conduct of its own business. On the other hand, the extent and activity of irrigation development by means of mutual projects of one kind or another show an increasing desire to get away from the rigidity of public regulation. At the present time, it seems doubtful if either theory is likely to prevail to the exclusion of the other. Both

[158] Among the many instances of minute control, the following are typical examples: In City of Corona v. Corona City Water Co. (1915) 6 Cal. R. R. Com'n Dec. 16, defendant was directed to submit for approval its rules and regulations governing the distribution of water. Rates were revised by the Commission in Application of Anna Del Segno, (1915) 6 Cal. R. R. Com'n Dec. 44, and Application of Atwood (1914) 4 Cal. R. R. Com'n Dec. 570. Rules and regulations as well as rates were passed on in Application of Eastside Canal and Irrigation Co. (1914) 4 Cal. R. R. Com'n Dec. 597 (where it was also directed by the commission that "within twenty days, defendant shall take over and operate all laterals supplied from its ditches"); East Bakersfield Improvement Association v. Bakersfield Water Company (1915) 6 Cal. R. R. Com'n Dec. 462; Application of Wadley (1915) 6 Cal. R. R. Com'n Dec. 730; Sacramento Valley Realty Co. v. Sacramento Valley West Side Canal Co. (1915) 7 Cal. R. R. Com'n Dec. 113. An increase in the size of mains was ordered in Gittings v. Windsor Water Co. (1915) 6 Cal. R. R. Com'n Dec. 498, etc.

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provide protection to the irrigator, one by giving him the services of experts to set out the terms under which he will be served with water and the other by making him the master of his own project. It can hardly be doubted that he is in a better situation today than he has ever before been, although, perhaps, in regarding his welfare, the development of the water resources for irrigation has to some extent been retarded.

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Spanish Colonial Municipalities

THE municipal organization of Castile, transferred to America soon after the advent of Columbus, began to function with no lack of vitality. The first conquerors brought to the New World a traditional love of liberty and a spirit of strong local autonomy which promised fair for development in the conquered and colonized territory. But during the sixteenth century the Spanish peninsular *municipio* was reduced from its earlier importance and power, being subjected to centralized control by officers of the crown. These were the *gobernadores, corregidores,* and *alcaldes mayores,* who went out to hold the local areas in the name of the national authority. These centrally appointed officers substituted for the direct democracy guaranteed by the municipal *fueros,* and for the system of local legislation arising from the petitions of the towns through their *procuradores,* a direct central legislation under royal *cédulas, cartas,* and *instrucciones.* Thus, through the conflict of the monarchs with the towns, was eliminated the initiative of earlier, more independent days.[1]

The significant characteristic of these peninsular *cabildos* (town corporations) before the epoch of Charles V was the possession of rights similar to those which had been won by Englishmen in their struggle for political liberty under their kings. The Spanish townsmen had established under their *fueros* the equality of all the citizens before the law. The character of the *vecino* (townsman) was superior to all social distinctions. This equality was considered essential for wise government of the commune, and if any counts, knights, or other noblemen should come to settle in it they must become subject to the same restrictions, including death penalties for certain crimes, as the earlier settlers.

In the Spanish towns the principle of the inviolability of the domicile was well recognized. It was not the Englishman alone who could claim that his house was his castle. Violation of this right was punished by the severest penalty, even death. In the *fueros* of Cuenca and Sanabria the method of entering the domicile under the authority of search warrant is prescribed with the

[1] R. Altamira, *Historia de España y de la civilisaciòn española,* II, 483; Carlos Navarro y Lamarca, *Compendio de la historia general de América,* II, 339.

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same precautions and respect for the rights of the inhabitants as are shown in the most modern legislation.

Furthermore, justice was dispensed to the citizen by his peers, chosen by him or by his counsel, save in matters wherein the royal jurisdiction intervened. No man might be deprived of life or property, nor be arrested by the *merinos* (king's justices) except in matters on which the local judges had already passed sentence. If the *merinos* passed such sentences, they were to be disobeyed.

Every man had a right to participate in public affairs. He shared in the election of magistrates. The authority of the town government was based on popular election; this constituted the legitimate sanction of the officer in the exercise of his duties under the local *fueros*. No confirmation of his powers from any authority outside of the municipality was necessary; not even the king had any intervention in the naming of the municipal officers.[2]

With respect to the responsibility of the officers of the Castilian city, the ancient legislation provided more amply, perhaps, than does much of the modern. "Injuries caused to citizens were to be compensated for doubly if by an officer; infractions of the *fueros* or deception in controlling public interests were punished severely as breaches of trust by loss of position. Instead of forming a shield for iniquity, municipal office brought upon an offender punishment twice as severe as that imposed in like case upon the private citizen, the public trust being construed as aggravating the offense."[3]

All this was absent in the Spanish-American municipality. The guarantees of the citizen were wanting. There was, too, the lack of forceful union between the towns, union which had in Spain given stability and respectability to the pretentions of the local entities. This had been secured through the *Santa Hermandad*, which in the earlier times constituted the visible arm of the united power of Castilian towns. But in America this source of dignity and power was at first altogether lacking; when the *Hermandad* did appear, it was as the arm and token of the central authority, imposed from above for the protection of the roads against highwaymen. Serving as an attempt to guarantee safety in the interstices between the areas controlled by the municipal areas, the *Hermandad* lent none of its majesty to the local government, and

[2] J. A. García, *La ciudad indiana*, 161.
[3] García, op. et loc. cit.

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served rather to aggrandize the central control and prevent development of local autonomy.

As far as form went, however, the local units of the New World modeled their government upon that of the towns of Spain. Municipal organizations, provided for under Columbus, and extended throughout *La Española* in 1507, began to exist wherever a group of Spaniards was numerous enough to require social control. By the last quarter of the sixteenth century there were at least two hundred such organizations in the Spanish Indies, under the designation of *ciudad, pueblo,* or *villa.* In some places the name *lugar* (literally "place") was used to designate the *pueblo,* but the latter word was used in most cases to designate settlements other than mining camps (*reales de minas*) not large enough to be called *ciudades.* In the period last mentioned a number of the earliest towns had died with the shifting movements incidental to continental settlement when once the larger land masses had been found to excel the insular holdings in opportunity for enrichment.

Essentially, whatever the designation, all the municipalities enjoyed the same legal status. There were minor variations in the composition of the official governing body, the elaborateness of the organization corresponding to development in size. Blackmar, who shows the derivation of the Spanish towns from the Roman ones in Spain, points out clearly that, whatever might have been the variety of the organization of the peninsular towns, there was practical uniformity in style of organization in the colonial municipalities. Bernard Moses draws attention to the fact that the colonial cities might owe their origin to development from an Indian mission or from a *presidio,* or that they might be founded outright as cities by an individual conqueror or by a group of settlers voluntarily associated for the purpose.[4] These variations in origin meant, however, no diversity in character among the municipal entities once they were organized. This uniformity was due to the existence of early general legislation and to the absence of those special frontier conditions which had in Spain

[4] Frank W. Blackmar, Spanish Institutions of the Southwest (Johns Hopkins Studies in History and Political Science, Extra Volume X, Baltimore, 1891), Chap. VIII, "Spanish Colonial Municipalities;" Bernard Moses, The Establishment of Municipal Government in San Francisco (Johns Hopkins University Studies in History and Political Science, Seventh Series, Nos. II, III, February and March, 1889).

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made the successive reconquests from the Moors the basis for grants of widely divergent *fueros* and special privileges.[5]

In all of the municipalities the essential officers were the *regidores* (town councilmen). Their number was variable, ranging from four in the small *villas* to eight in the large *ciudades* and to twelve in the capitals, as for instance Mexico and Lima. Their importance was due to the fact that they had power of decision in matters of routine administration, and because from their number were annually chosen the *alcaldes ordinarios* (municipal judges, usually two in number) and the *alférez* (herald), whose function it was to bear the municipal banner on festal days. In occasional instances, the *alférez* was also a *regidor*. After the inception of the *Hermandad* in the New World, its *alcaldes* were chosen from among the *alcaldes ordinarios;* this was later than the beginnings of municipal administration; in Lima, for instance, the *alcaldes* of the *Hermandad* did not appear until 1560.[6] In New Spain the *alcaldes* of the *Mesta,* or grazers' guild, appear among the list of annually elected municipal officers until well toward the end of the eighteenth century.[7]

The number of *regidores* varied from one period to another, as well as in classes of towns. In the *Ordenanzas,* cited above, it was provided that the governor of a new territory within which a city was to be erected should make declaration whether the new establishment was to be designated a *ciudad, villa,* or *lugar* (*pueblo*). The government of a metropolitan city was to contain one *alcalde mayor* or *corregidor,* he being characteristically the appointee of the central or provincial power. In his hands was to be placed the jurisdiction *in solidum.* The *capitulares* (town officials) designated in accordance with the colonizing grant, were to be the three *oficiales reales* (treasury officers), twelve *regidores,* two *jueces ejecutores,* and a small number of accessory executive and clerical subordinates. Two of these

[5] Legislation covering foundation of early municipalities is found in *Ordenanzas sobre descubrimiento nuevo y población, in Colección de documentos inéditos relativos al descubrimiento, conquista, y organización de las antiguas posesiones españolas de América y Oceanía,* Tom. 8 pp. 484-537. This legislation was afterward incorporated in the *Recopilación de Indias.* It has been recapitulated by O. Garfield Jones under the title "Local government in the Spanish colonies as provided by the *Recopilación de leyes de los Reynos de las Indias,*" in The Southwestern Historical Quarterly, Vol. 19, pp. 65-90.

[6] Altamira, *Historia de España,* II, 313.

[7] A. Cavo, *Los tres siglos de México, passim.*

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were the *jurados,* one of whom was prescribed for each parish in the new settlement, perhaps the prototypes of the later *alcaldes de barrio* of the eighteenth century. The *procurador general,* known as time went on as the *síndico* (city attorney), was a man of recognized ability, social category, and political influence in the community.[8]

For the smaller settlements, known as *villas, pueblos,* or *lugares,* the *Ordenanza* of 1563 *provided* one *alcalde ordinario,* four *regidores,* one *alguacil* or bailiff, and some minor officers. Here the *alcalde mayor* or *corregidor* was wanting; this would indicate that municipal life was more free from the trammels of supervision in the smaller places, or that the *alcalde mayor* extended his control to the lesser from the larger settlements, as later came to be the rule.

In the closing years of the colonial epoch, the number of *regidores* was set at twelve for the larger cities; eight was the number considered proper for Guanajuato and San Luis Potosí in New Spain, while most of the smaller towns were to have six. In the City of Mexico there were fifteen.[9]

The method of choice of the city officers was subject to notable variation. In new conquests it was usually the privilege of the leader of the expedition (governor, *adelantado,* captain-general, or whatever was his title) to nominate the first set of officers for the towns erected within the area of his roughly delimited royal grant. This power was conceded by specific permission contained in the conqueror's *capitulación* or grant, as in the case of Pizarro at Lima (1535), of Pedro de Alvarado at Santiago de los Caballeros (1524), and in numerous other cases.[10] If this privilege was not specified in the *capitulación,* the municipality was organized by means of an election in which participated every free member of the expedition; nomination by the conqueror was, however, the normal and more usual method. Usually, when the first group so appointed or elected had served a natural year, which was the prescribed term of office, the re-

[8] Lucas Alamán, *Historia de Méjico,* I, 58. J. N. Rodríguez de San Miguel, *Manual de providencias económico-políticas para uso de los habitantes del Distrito Federal,* 215.

[9] Cf. Alamán, op cit., I, 57, and Altamira, op, cit., III, 314.

[10] In the towns which sprang up about the *presidios,* the municipal *cabildo* might remain absent for a long period, as in the case of San Francisco, California, which existed from 1776 to 1834, without the *cabildo* organization, Moses, op. cit., 17-18.

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tiring *regidores* designated their successors; certain conquerors, Pizarro and Alvarado again as illustrations, named the successors. Until 1621 or 1622 the *oficiales reales* or treasury officials, whose principal duty it was to care for the interests of the king's revenues, sat in the municipal *cabildos* "with voice and vote." Restrictions on this practice had begun in 1567, when the *oficiales reales* were forbidden to serve as *alcaldes*.

The periodical renovation of the city's governing body was attained not only by the annual election, but also by the provision that no *regidor* might be re-elected until one year had elapsed since his term of service; in the case of the *alcaldes ordinarios* at least two years must have so elapsed. The efficiency of this inhibition was largely nullified in practice by the rotation in office of members of a few allied families, who maintained oligarchical control in alternation.

It was the royal intention, as evinced in the earlier legislation, to prevent the central authority, represented by the viceroys and governors, from intervening in municipal elections, but the laws to this effect were nullified in practice by the central officers, who had the legally prescribed power to confirm or disapprove the annual elections. An instance of such interference occurred in Buenos Aires in 1590, despite the efforts of the *cabildo* to prevent. Again in 1609 Governor Saavedra of Buenos Aires named an *alguacil* (marshal) "with voice and vote" in the *cabildo*. The perpetual *regidores* (of whom more later) acceded to the illegal appointment, but the elective *regidores* resisted until the governor coerced them by a fine of five hundred *pesos* each. Not only fines, but imprisonment, resorted to repeatedly by governors, served to enforce their predominance, which brooked no opposition. So far was the practice carried that men refused to accept municipal office, like the senators of the Roman Spanish towns, until fines were imposed to oblige them to accept.

Not only was the elective faculty overridden to a large extent by the viceroys and governors; still another feature of administration served to reduce it. This was the practice of selling offices, due to the impecunious condition of the Spanish crown. The Catholic Kings had forbidden the sale of offices, and Juana la Loca had restricted it to non-judicial offices; by the end of the seventeenth century, however, the practice had become set-

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tled and general. Frequently public offices were disposed of by auction to the highest bidder. In Buenos Aires in 1644 a number of regidorships were auctioned, bringing revenues from eight hundred and fifty to twelve hundred and fifty *pesos*. The position of *alcalde de la Hermandad*, thus disposed of in 1671, produced thirteen hundred *pesos*. Lesser municipal offices, as those of *escribano* (notary) and *alguacil mayor*, were leased or farmed for a lump sum to be covered by the incumbent from fees collected.[11]

Navarro y Lamarca, following several writers of the epoch during which the practice of selling offices was in vogue, thinks that the system has been overcriticised, and that the men who bought offices were more inclined to administer them conscientiously than were the "irresponsible and voracious minions of the viceroys." The same author calls to attention the fact that Montesquieu considered the practice advantageous and perfectly proper.[12] Insofar as his efficiency was concerned, it may be safely asserted that whether the position of the *regidor* was obtained by purchase or by election, that accident was of less importance in determining his value to the State than was the fact that the whole political heirarchy of the Spanish empire, colonial and peninsular alike, was characterized by malfeasance and graft with such notable exceptions that honesty in office was the crowning virtue whereby many names of colonial administrators have become conspicuous if not illustrious.

One very notable effect of the sale of offices was the tendency of the central authority to increase unduly the number of them for the sake of the revenue thus produced, regardless of the consequence to efficiency. This caused a cynical attitude toward tenure of office which did not a little to destroy the public spirit of the colonists. The customary sale of the office of *regidor* seems at no time to have completely eliminated the feature of election of at least a part of the municipal corporation. Six of the *regidores* of the City of Mexico were elected every two years by the perpetual *regidores*, who held by purchase or inheritance; this at the close of the eighteenth century.[13] The power to appoint *perpetuos* had, indeed, been held by some of the earliest

[11] García, *La ciudad indiana*, 170-171.
[12] Op. cit., II, 341, note 1, citing *L'Esprit de lois*, Cap. XIX, Cf. E. G. Bourne, Spain in America, 227-29.
[13] Alamán, ubi supra, n. 8.

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conquerors; Pizarro, by the terms of his *capitulación*, could name three of them. The purchase of the *regiduría perpetua* by well-to-do families gave in time to the creole families of colonial society their one avenue of admission into participation in *la cosa pública*, though it is true that at times, through default of suitable Spaniards, the creoles came into control of the *audiencias* (supreme courts of justice with certain administrative functions). It may be a little doubted that the preponderance of the creole element in the *cabildos* was one of the compelling motives for the policy pursued by the Spanish government in emasculating these as authoritative bodies.

So much, briefly, for organization and perpetuation of the *cabildo*. Of equal interest is the subject of the general powers of the municipal corporation. These were both administrative and judicial for their areas, but their range was limited by the original grant of privileges, and more especially as time elapsed, by the issue of ordinances for municipal guidance by the viceroys and *audiencias*. The general laws of the *Recopilación de Indias* combined with these ordinances to reduce the initiative of the city government to a minimum. Judicial functions were supposed to be exercised by the *alcaldes ordinarios* in first instance in both civil and criminal suits. In civil suits involving certain sums the *cabildo* was a court of appeal also from the decisions of the *alcaldes;* it might itself be appealed to from the governor, though the practice of the *audiencias* of sending out special judges for causes of consequence gradually limited the bases for appeals which would normally have gone through the municipal courts.[14]

In affairs of administration the *cabildo* was theoretically independent in everything that had to do with the adornment of the city, the improvement of its public works, regulation of economic affairs, such as fixing the prices of products, wages, and the levy of local taxes, the inspection of jails and hospitals, administration of the public lands (of which more anon), and the oversight of public morals. All of these cares of the municipality were by a *cédula* of 1535 carefully distinguished as administrative and not judicial, so as to forestall the intervention of the judges of the *audiencias* in them. As a matter of fact, however, the *cabildos* were in all of the above matters under the

[14] Hipólito Villaroel, *Enfermedades políticas que padece esta capital de Nueva España*, MS, Tom. I, parte 2a, folios 95-102.

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domination of the *corregidores* or governors, who presided over them and had the power of executing the *acuerdos* (votes) of the *capitulares*, and these decisions they often modified or nullified through interpretation or neglect. The *corregidores* were notorious for their injustice in the division of the public lands and in their efforts to profit personally from the exercise of authority.

The *cabildo* deliberated usually in secret, that is, there were not public hearings of their sessions, and the *capitulares* were bound by oath to maintain secrecy in regard to their deliberations. Notable variation from this procedure occurred when, for the purpose of negotiating a forced loan (*donativo*) for the king, the influential and well-to-do members of the community were invited to join what was known as the *"cabildo abierto"* (open town meeting). Such meetings occurred frequently in Buenos Aires during the seventeenth century.[15]

A still more noteworthy development of *cabildo* government occurred in the earlier part of the Spanish domination. In the island of La Española there began, shortly after the initiative of the settlers had brought about the establishment of municipal governments, the practice of holding assemblies of the *procuradores* of the towns after the manner of the gatherings of the *Cortes* in Spain. These convocations had the right of gathering without the call of the governors, and were empowered to authorize the latter to execute whatever might be conducive to the general welfare. This created a type of resolution which was used as a temporary substitute for the decision of the Council of the Indies, which, arriving tardily, as was frequently the case, was often found inapplicable to the situation which it was intended to affect. The assembly of the *procuradores* also came into vogue in Cuba; it met annually at Santiago de Cuba for the purpose of recommending to the king measures of state interest and reporting to him the necessities of the island, together with petitions that he supply them. This practice was in vogue as late as 1532 and 1540, as records of such assemblages bear these dates. On the continent the practice was continued, particularly in New Spain and New Castile, where the congresses of the towns were recognized by Charles V in *cédulas* which gave to

[15] García, op. cit., 199-201; cf. Bernard Moses, "The Colonial City," Chap. XVIII, Vol. II, of his The Spanish Dependencies in South America.

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Mexico and to Cuzco, respectively, the right to the first vote in the assemblies. During the sixteenth and seventeenth centuries no less than forty such assemblies were held, though little is now known as to their history and effectiveness, save that they were, of course, means of communication and petition.[16] The congresses of New Spain, says Alamán, writing of the beginning of the independence period, had long ceased to meet.

Of a congress of the towns of New Spain which met in the year 1528, it is recorded that the purpose of the convocation was to send a representative to court with suitable instructions. *Procuradores* of the towns of Mexico, Vera Cruz, Espíritu Santo, Colima, and San Luis participated in the deliberations "in order to discuss and vote upon what might be to the service of God and his Majesty and to the perpetuity of this land." At this session, May 26, two *procuradores* were elected to be sent to Spain. On June 1, another session voted to give these agents a salary of four ducats per diem from the time they should leave Mexico City until they should have fulfilled their mission. The towns prorated among themselves a fund of nearly seventeen hundred *pesos* for this journey in the following proportions: Mexico paid eight hundred *pesos,* Vera Cruz three hundred, Espíritu Santo seventy, Colima fifty, Zacatula two hundred and fifty, San Alfonso de los Zapotecas fifty, San Luis one hundred. In 1528, when Doctor Ojeda was making a voyage to Spain, the congress had voted him a commission "to negotiate with his Majesty to have granted to the City of Mexico, in the name of this New Spain, a voice and vote in the *Cortes* which his Majesty and the kings his successors might order convened." This privilege was granted.[17]

One of the most important of the matters which concerned municipal existence in the Spanish colonies was the disposal and utilization of the land. Whether a town were founded by a conqueror or by a group of voluntary associates, the crown theoreti-

[16] Altamira, op. cit., III, 316, cf. Alamán, op. cit., I, 39, 58.

[17] Alamán, *Disertaciones sobre la historia de la República Mexicana,* II, 315-316; cf. *ibid* I, 167, 259. See also *Copia de la mayor parte y mas importante y útil del Libro Primero que comienza en ocho de marzo de* 1524 *y finaliza en* 10 *de junio de* 1529, *en que se asentaron todos los cabildos y juntas que tubo la Nobilísima Ciudad de Mexico en dicho tiempo,* MS. folio 237. Later interesting material on the municipal régime of Mexico is contained in the *Traduccion paleográfica del libro cuarto de cabildo de la Ciudad de Mexico,* Mexico, 1874. This imprint covers the period from January 1, 1536, to August 30, 1543.

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cally conceded to the new venture a grant of land four leagues square. The actual amount of land was, of course, modified by situation and other physical accidents. The basis of the subdivision (*repartimiento*) of the land was to provide suitable grazing and arable areas. In conformity with the usual European custom, land for residence purposes was distinct from that used for other purposes. First, then, were set aside at the center of the settlement a sufficient number of town lots (*solares*), around which was a strip of commons (*ejidos*) for various communal uses; beyond these were the *dehesas y tierras de pasto,* or grazing grounds, and the municipal grounds (*propios*) for lease for revenue under a system of perpetual leasehold payment, known as the *censo*. Aside from these lands, there was apportioned one-fourth of the remainder to the principal conqueror, and the remainder to the other settlers by *peonías* and *caballerías,* that is, in portions for footsoldiers and horsemen, varying in number granted to each in ratio of their importance or merit. It would be beside the present subject to go into the matter of the disposal of all these lands, and it is sufficient to say that it was from the *propios* that the municipality expected, when it had them, to derive a large part of its revenue. Accretions of numbers of new citizens, such as occurred at Buenos Aires after the original allotments, invaded the areas set aside as *propios* and impoverished the towns in proportion. Often, too, there were no lands actually set aside and utilized as *propios,* so that municipalities frequently lacked entirely this source of revenue. Other income was provided from the *arbitrios,* which were duties collected by the towns from mercantile business, trades, and products. From all sources the sums obtained were comparatively meager, and the control of the *cabildo* over them was limited as we shall see.

The establishment of a city of importance was sometimes accompanied by, but more frequently followed by, the granting of honors and distinctions attended by pomp, circumstance, and formality. These were not uncommonly conceded for the payment or gift of large sums of money needed by the monarch. The city was for some such consideration granted use of an heraldic device, the symbols of which commemorated noteworthy

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features of the locality, an incident of the conquest, or the union of the city with the crown of Castile.[18]

The title of *Muy noble y leal* was usually prefixed to the designation of the city, and these words were used in correspondence or official documents. The City of Mexico was by order of Charles V, on July 24, 1548, designated *"La muy noble, insigne, y muy leal e imperial ciudad de Mexico,"* which "shall enjoy the privileges and preëminences of grandee, as metropolis of this New Spain." In the official correspondence a city of this rank was addressed as *"Ilustrísimo Señor."*

Pomp and ceremony were observed, with careful regulation of the proper precedence of the municipal officers, when the corporation sallied forth *"en cabildo"* from the *casa de ayuntamiento* upon festival occasions, such as the celebration of the town's Saint's Day, to meet and greet a new viceroy, governor, *corregidor,* or what not. The installation of the *corregidor* of Mexico, as prescribed by the ordinance of 1728, affords a good illustration of municipal formality.[19] The *corregidor,* after his election by the king, was required to notify the *cabildo* of his coming. That body went out in array to meet him and conducted him to the viceroy, of whom he was required to ask permission to present his title to the *audiencia.* This arranged for, the *cabildo* and retiring *corregidor* conducted the new appointee to the town hall, there to take up his residence. After the ceremony of acknowledgement of his title by the *audiencia,* a day for his formal reception by the *cabildo* was set by the new *corregidor.* At this quaint ceremony the retiring *corregidor* and the *regidores* rose to their feet with bared heads as the new *corregidor* entered their presence. The retiring executive received into his hands the royal appointment of his successor, kissed it, and placed it upon his head in token of obedience; he was imitated in this formality by the ranking *regidor,* the other *capitulares* remaining standing the while. This done, the new *corregidor* was required to take an oath to perform his office well and faithfully, to defend the purity of the Immaculate Conception of the Blessed Virgin, and to preserve the *fueros* and preeminences of the city, to keep secret the business conducted in *cabildo,* and to strive in all things

[18] Antonio Peñafiel reproduces many of these heraldic devices in his *Ciudades coloniales y capitales de la República Mexicana,* 5 volumes, Mexico, 1908-14.

[19] Rodríguez de San Miguel, *Manual de providencias,* pp. 187-247.

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to keep the republic in peace, doing all that he could to promote the happiness of the king's vassals. He was thereupon presented with the staff of office, which was the public symbol of his rank and importance. Invested therewith, he stepped to the right hand of his predecessor, whom he thanked and congratulated. The record of the ceremony was required to be kept in the minutes of the *Libro de Cabildo,* which today furnishes so much interesting and valuable history of colonial municipal life.[30]

In the first meeting of the *cabildo* after his installation, the new *corregidor* was notified that he must, within thirty days, post bonds for the *residencia* (judicial inquiry concerning administrative acts) which legally attended retirement from office in the Indies; if he failed to do so he was to forfeit his salary for the period of his delay. After all this had been done, the new *corregidor* escorted his predecessor to his new private residence, and then, all formalities having been complied with, a full and circumstantial report of his induction into office was sent to the viceroy and to the Council of the Indies.

How insistent the *cabildos* were upon their privileges and preeminences is shown from an occurrence wherein the *cabildo* of Guatemala came into conflict with the royal *audiencia* residing in the same capital upon the occasion of the reception of a newly appointed bishop of that see. In 1737 the *cabildo* complained that it had been prevented from seating its two *alcaldes* in the choir of the cathedral in the seats of the dean and the archdeacon during the installation of the bishop. This ancient *"fuero y privilegio"* was denied the secular *cabildo* by the religious *cabildo* (chapter of the cathedral). The president of the *audiencia* was appealed to, but he gave no comfort to the insulted *alcaldes,* refusing to intervene for them, but on the contrary ordered the

[30] Among the municipal documents available in print, besides those for Mexico City mentioned above in Note 17, are two small volumes for Guatemala, edited by Rafael Arévola: *Colección de documentos antigüos del archivo del ayuntamiento de la Ciudad de Guatemala,* Guatemala, 1857; and *Libro de actas del ayuntamiento de la Ciudad de Santiago de Guatemala. Comprende los seis primeros años desde la fundación de la misma ciudad en* 1524 *hasta* 1530. . . . . Guatemala, 1856. For Buenos Aires there have been published the *Acuerdos del extinguido cabildo de Buenos Aires. Publicados bajo la dirección del archivero de la nación* . . . . 4 volumes, Buenos Aires, 1907-08, and the *Documentos y planos relativos al período edilicio colonial de la Ciudad de Buenos Aires,* 5 v., Buenos Aires, 1910. The municipal life of Santiago de Chile is recorded, with documents, in M. L. Amunátegui, *El Cabildo de Santiago, desde* 1573 *hasta* 1581 . . . . 3 volumes, Santiago, 1890-91.

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secular *cabildo* to attend the ceremony in a body. When they refused, he designated them *"inobedientes,"* fined them five hundred *pesos,* imprisoned them, and deprived them of their arms and insignia. The *audiencia* named new *alcaldes* and *regidores,* with whose attendance the installation of the bishop was celebrated. The crown absolved the *capitulares* of their fines and restored them to their positions and honors, but the characterization of *"inobedientes"* was left standing. To overcome this, the *capitulares* appealed to the crown to order the *audiencia* henceforth to observe its legal limitations and not interfere with the regulations prescribed for ceremonies in which *cabildo* and *audiencia* were to participate. In November of 1737 the king answered this petition by ordering the president of the *audiencia* to hear both the *audiencia* and the *cabildo* and report his findings to the Council of the Indies. His report the following year showed that the *audiencia* had arrested the *cabildo* "first, to maintain its own decorum and authority, and, second, because the plebeians were watching to see what would happen between the *audiencia* and the *cabildo."* But, as the *capitulares* had shown that their refusal to attend the installation was not due to a spirit of disobedience, but merely to preserve their privileged preference in the matter of seats, the president judged that they were without real blame.

To cut the story short, the king in 1740 ordered that the *audiencia* should henceforth refrain from attending episcopal installations in a body, and that the *alcaldes ordinarios* be restored to the ancient seating procedure which obtained before the *audiencia* began (illegally) to participate in this ceremony.[21] The incident illustrates the length to which municipal bodies were willing to go to maintain their "ancient privileges," and shows how puerile some of these were. It also points illuminatingly to some of the difficulties with which the Spanish crown had to contend in administering its colonies. The quarrel had lasted eight years, and numerous hearings had been held both in Guatemala and Madrid before the childish difference was settled. Interest attaches also to the fact that in this instance the *cabildo* was victorious over the *audiencia;* rather the exception than the rule.

During the rule of the House of Hapsburg the political insti-

[21] R. Arévalo, comp., *Colección de documentos antigüos del archivo del ayuntamiento de la ciudad de Guatemala,* 9-13.

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tutions of the Spanish empire suffered from the gradual decay which brought threat of disintegration at the time of the demise of the last monarch of that line, Charles II. When the House of Bourbon ascended the throne in the person of Philip V, the policy of the nation became one of general reform, based on the French model of administration. So far as the Indies were concerned there were not marked symptoms of this change until the time of Charles III (1759-1788). That benevolent despot began his program of rehabilitation by sending to New Spain the distinguished visitor-general, José de Gálvez. This minister was instructed, among other things, to take note of the condition of the municipalities, particularly for the purpose of reforming their financial systems so as to prevent malversation of funds, the conspicuous sin of municipal administration. In 1767 he began this work while on a visit to the northern provinces of the viceroyalty. The cities of San Luis Potosí and Guadalajara were found to have allowed their *cabildos* to fall into desuetude, a condition widespread in Spanish America at that time. In San Luis Potosí there were only two *regidores,* and these mere lieutenants and not *proprietarios* as they should have been; one of them was also *alcalde ordinario,* which he should not have been. Gálvez accordingly caused six new *regidores* to be elected for a term of one year, the number thus being made eight. The city was also now divided into ten *barrios,* or wards, each of which was placed under control of a *regidor* or an *alcalde.* A list of all the resident tributaries was ordered made, and the neglected practice of guarding the municipal treasure by use of the strong box with three keys was restored according to law. Similar provisions for the revivication of Guanajuato were made by the visitor-general at this time.

Upon his return to the capital, Gálvez found that an investigation of the cities of the viceroyalty which he had inaugurated had disclosed unbelievable disorder and confusion in municipal finance. In many towns no account books had been kept at all, even for the simplest receipts and expenditures. The situation was so bad that it was thought wise to establish in Mexico City a *contaduría general* which should keep the accounts of all the municipalities. After the establishment of this accounting office no expenditures of city funds might be made by *regidores* without prior consent of the *contador general.* Plainly this reduced

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the municipalities to a level of irresponsibility which was later to be surpassed by the provisions of the Ordinance of the Intendants, which went into partial effect in 1786.

For the City of Mexico the reforms of Gálvez were embodied in an ordinance promulgated by the viceroy in 1771. The essential feature of this ordinance was the increase of responsibility placed upon the municipal officers with decrease of salaries and fees. Duties such as the inspection of markets, of weights and measures, and other cares grouped under the heading of *policía* (good government) were still, as under the old regulations, to be performed by committees of the *regidores* in annual turn, but without the extra pay which had previously been conceded. The independence of the corporation was, by the minute provisions of the ordinance, reduced to the vanishing point.

Interference of the viceroy with the municipal body was emphasized by another ordinance emanating from the visitor and the viceroy for minute regulation of the bakers' guild of the capital. There were at that time, or shortly after, some fifty guilds of trades workers in the city, management of which gave to the government much concern. These might well have been cared for by the *cabildo;* but when the viceroy of a great kingdom like New Spain, twice as large as modern Mexico, could descend to the details of regulating the number of bakeshops and the size and price of loaves while the *fieles executores* (judges of weights and measures) of the *cabildo* sat by in silence waiting the issue of his dispensation, there could have been little left to the discretion or self-respect of the *cabildo.*

The Gálvez reforms contained still another manifestation of the centralizing policy of Charles III. This was the appointment by the viceroy of six *regidores honorarios* to sit with the twelve (later fifteen) elected and hereditary *capitulares,* without salary and in a purely advisory capacity. This was in emulation of the new system then in force in Madrid. The purpose was, of course, to give the viceroy closer oversight of municipal affairs and enable him better to oppose the radical creole element by drawing his appointees from the more conservative Spanish group. The regular members of the *cabildo* were restive under the new arrangement, and in 1794 obtained the power to nominate the *honorarios;* this continued until independence, and, of

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course, did away with the effectiveness intended by their institution.[22]

The municipal reforms initiated by Gálvez during the visitation of New Spain were incorporated in the legislation establishing the intendancies which went into partial effect in New Spain in 1786, similar legislation having previously been applied in some measure in Havana in 1764 and in New Spain itself by Gálvez in 1765 (he being an *intendente de ejército* himself), and in Peru in 1782. The viceroy Revilla Gigedo was obliged to confess in 1794, however, that the provisions of the Ordenanza concerning municipal regulation had not yet been enforced.[23] Under its provisions, the *intendentes* (who superseded the governors and *corregidores*) were supposed to frame regulations for the control of town revenues derived from lands and buildings, that is, the *propios*. These regulations they were to submit to the *Junta Superior de Real Hacienda* (the standing administrative committee of the treasury system) for approval, but they had neglected, said the viceroy, to do either. As a result, there was no improvement in the chronic malady of the municipalities. "Malversation of public funds is a common and inveterate evil . . . . concerning which José de Gálvez . . . . later Marqués de Sonora, labored most and gathered least fruit."[24]

But the life of the municipality was depressed in other ways than those which affected finance. Under the *Ordenanza de Intendentes* the local autonomy was completely prostrated by the absorptive action of the *Junta Superior de Real Hacienda*, the viceroy, and the "intendant-governors." Francisco de Croix in Mexico exercised his viceregal talents in supervising the cleaning of the streets, (at a later day Revilla Gigedo was fain to

[22] *Reglamento e instruccion del visitador general Don José de Gálvez para la Nobilísima Ciudad de México, mandada observar por el Marqués de Crois en decreto de 22 de Enero del año de* 1771 (Mexico, 1771), *passim.*

Reglamento del gremio de panaderos de esta capital para su abasto y erección de un pósito de trigos y harinas a beneficio de su común (Mexico, 1771), *passim.*

Revilla Gigedo, Juan Vicente, *Instrucción reservada que el Conde de Revilla Gigedo dió a su sucesor en el mando, Marqués de Branciforte, sobre el gobierno de este continente en el tiempo en que fue su virey* (Mexico, 1831), Articles 154-6.

Herbert Ingram Priestley, José de Gálvez, Visitor-general of New Spain, 1765-1771, 222-26, 296-303.

[23] Revilla Gigedo, *Instrucción reservada*, ubi supra; *Real ordenanza para el establecimiento e instrucción de intendentes* (Madrid, 1786), Articles 28-53.

[24] Revilla Gigedo, *Instrucción reservada*, ubi supra.

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order the dung-hills out of the thoroughfares) repairing roads, providing pure water, public baths, illumination, hospitals, jails, foundling homes, and so on. All were, of course, necessary and valuable improvements, bringing the vassals willy-nilly into contact with the amenities of civilization, but the tragedy lay in the spirit of the system which brought the viceroy, the *alter nos* of royalty, drawing a salary of eighty thousand *pesos* per annum, to performing tasks which lesser men could have done as well if educated to responsibility and given normal outlet for self-expression in activities which form beneficent safety-valves to large groups of citizens who in flourishing democracies find fields thus opened to them for useful public service.

The *Ordenanza* gave the *cabildo,* so far as it was the means of conserving the self-respect of the towns, the *coup de grace.* Its nullity, long existent, was now given the sanction of law, the *capitulares* being given the merely routine drudgery imposed by central authority.

The intendant of the province presided over the *cabildo* (as had the governor, theoretically, before him), kept the accounts of the *propios,* and reported the condition of finances to the *Junta Superior,* or else as in Mexico, neglected to do this at all. He divided the town funds into groups, that is, budgeted them, as prescribed by the *Ordenanza,* being guided in his expenditures by the hard and fast provisions of the general law. To complete the control, the *regidores* were practically eliminated from intervention in fiscal matters by the appointment of municipal *juntas* composed of the *alcalde ordinario,* two *regidores,* and the *procurador.* These committees had authority to manage city funds without the intervention of the other *capitulares.* The intendant also took over the supervision of agriculture, commerce, mining, forests, roads, inns, streets, public parks, and municipal buildings. He or his *asesor* (adviser) took over the guidance of municipal justice. In this duty the *asesor letrado* preserved the tradition of bulldozing the *regidores* with the same tyrannical cynicism that had been the chief characteristic of the deposed *corregidor.* The *Ordenanza* prescribed the intervention of the intendant or his *asesor* in matters of justice "to prevent the municipal judges from acting with partiality, passion, or vengeance."[25] But the *asesor* took it upon himself to intrude in all

[25] Real ordenanza, article 28; García, *La ciudad indiana,* 293.

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the deliberations of the *cabildo;* indeed, his manner of doing so was not, as instanced at Santiago de Chile, calculated to retard the inevitable process which eventuated in independence. "The *asesor letrado,*" it was reported to the king, "does not treat the *cabildo* with that respect and moderation imposed by law and ceremonial. He interrupts with insulting words the most serious functions of this respectable congress. To make detailed statement of the outrages which have been endured by the members of this venerable corporation of the republic would be to descend to petty prolixity or to confess excessive affection for distinctions; hence, let it suffice to say that ever since the *asesor* assumed his duties there has been none of that peace which was enjoyed in earlier but less quiet times, because he believes that he can make his opinion prevail in the sessions of the *ayuntamiento* against the opinions of all the rest, by interrupting and depreciating in harsh and insulting phrases the opinions which he considers opposed to his own."[26]

In resumé then, it is apparent that the municipality was brought to the New World with the tradition of the ante-sixteenth century autonomy still alive, but that the expression of that autonomy in America was a mere flicker of the old-time independence extinguished by Charles V on the field of Villalar. The embryonic *Cortes* survived for more than a century in America, but only by sufferance of the monarch, and representation of the towns in the Spanish *Cortes* suffered all the vicissitudes of the peninsular organization plus the inherent difficulties of great distance, stormy seas to cross, and the tradition of colonial subordination to peninsular welfare. While the colonies grew in population, while the cities developed in size and opulence, their juridical status, which should have kept pace with material success, was consistently sacrificed by a policy which feared the *creole* and the *mestizo,* which based colonial welfare and imperial integrity on the exclusion of the colonist from participation in *la cosa pública* because he was, as a result of the completion of the vicious circle, very seriously incapacitated for proper discharge of the duties of citizenship. Small wonder that the cities, thwarted in their normal development by centralist control, became the centers of revolt and separation from Spain.

[26] García, *La ciudad indiana,* p. 294, citing M. L. Amunátegui, *Los precursores de la independencia de Chile* . . . . 3 volumes, Santiago, 1870-72.

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After that, once free from the decrepitude of the declining control of the fatherland, they became centers of separatism and disintegration that defied for nearly a century the development of reasoned and self-directed nationalism.

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The Parol Evidence Rule in California

IT IS provided in the California Code of Civil Procedure that:

> "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases: (1) Where a mistake or imperfection of the writing is put in issue by the pleadings; (2) Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section eighteen hundred and sixty, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties."[1]

Section 1625 of the Civil Code provides as follows:

> "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

These sections are the only provisions in our codes expressly dealing with the so-called parol evidence rule.

The first fact to be borne in mind in considering this rule is that the doctrine is one of substantive law rather than of the law of evidence. This was first clearly explained by Professor Thayer in 1893.[2]

Professor Wigmore in his treatise on evidence also emphasizes the distinction. The rule, says the learned author, "does not exclude certain data because they are for one or another reason untrustworthy or undesirable means of evidencing some fact to be proved. It does not concern a probative mental process,—the process of believing one fact on the faith of another. What the rule does is to declare that certain kinds of fact are legally ineffective in the substantive law; and this of course (like any other ruling of substantive law) results in forbidding the fact to be proved at all. But this prohibition of proving it is merely the dramatic aspect of the process of applying the rule

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[1] Cal. Code Civ. Proc. § 1856.
[2] The "Parol Evidence" Rule, 6 Harvard Law Review, 325.

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of substantive law. When a thing is not to be proved at all, the rule of prohibition does not become a rule of evidence merely because it comes into play when the counsel offers to 'prove' it or 'give evidence' of it; otherwise, any rule of law whatever might be reduced to a rule of evidence; a ruling (for example) that on a plea of self-defense in an action of battery no evidence of the plaintiff's insulting words is to be received, would become the legitimate progeny of the law of evidence."[3]

This distinction is of more practical importance than may, at first sight, appear. This is made clear in the two California decisions which deal with the subject.

In a decision rendered by the District Court of Appeal in the case of Dollar v. International Banking Corporation,[4] the court had said in commenting on the failure to object to the admission of certain parol evidence of the contents of a document: "No objection was made to the introduction of this testimony, but the incompetency of parol evidence to vary a writing may be considered as a matter of law."

In a petition for a rehearing it was claimed that the statement was incorrect and that secondary evidence of the contents of a written instrument should be considered by a trial court, when no objection was made to its introduction in evidence.

The District Court of Appeal in passing on the petition took occasion to point out the distinction in this regard between the parol evidence rule and the so-called best evidence rule. Said the court:

> "Whether or not a contract in writing may be varied by parol evidence is a question of substantive law while the admission or rejection of secondary evidence is governed by the rules of evidence. By way of illustration of the distinction between the rule declared by this court and that cited by appellant, it may be said, that parol or secondary evidence, unobjected to, might supply the terms, or purport, of a contract which had been reduced to writing, and, in this form, furnish sufficient proof to sustain a finding, but parol evidence would neither be admissible to vary this contract, nor, if admitted without objection, be sufficient to support a finding which was in conflict with or which in any manner varied the original written contract which the parties entered into. The purpose of the rule relating to the varying of a writing by parol evidence is to prohibit this

[3] Wigmore on Evidence, § 2400, (1).
[4] (1910) 13 Cal. App. 331, 109 Pac. 449.

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> from being done, while the rule relating to the admission of secondary evidence goes only to the form in which the evidence may be introduced."

The Supreme Court in the case of Harding v. Robinson[5] also recognized the true nature of the parol evidence rule. In its opinion the court quoted with approval the following language of one of the Circuit Courts of Appeals:

> "According to the modern and better view, the rule which prohibits the modification of a written contract by parol is a rule, not of evidence, but of substantive law."[6]

Our Supreme Court further stated in its opinion that—

> "By that law the solemn obligations of parties evidenced by their writings may not be modified or set aside for fraud unless the rules of this substantive law in pleading the fraud are duly complied with. Furthermore, when they have not been so complied with, not only is evidence inadmissible to effect such a modification of the contract, but if it be admitted, and that without objection of the opposing party, nevertheless, it is the duty of the court to disregard it utterly in reaching its decision."[7]

Since the rule is one of substantive law, it might appear that it should apply regardless of whether or not a question as to what constituted the actual agreement arose between the parties to the writing or between one of the parties and a third person. It is settled, however, that in the latter situation, the doctrine is not applicable and the writing may be varied by parol evidence.[8]

II.

Our Code of Civil Procedure[9] enacts that "no evidence" of the terms of a writing may be given other than the contents of the writing in cases where the rule under discussion is applicable. The Civil Code also provides, it will be recalled, that the execution of a contract in writing "supersedes all the negotiations or stipulations concerning its matter which preceded or ac-

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[5] (1917) 175 Cal. 534, 166 Pac. 808.

[6] Pitcairn v. Philip Hiss Co. (1903) 123 Fed. 110, 61 C. C. A. 657.

[7] Also see Lawrence v. Premier Indemnity Co. (July 5, 1919) 58 Cal. Dec. 51; Farmers' Bank v. Altura etc. Co. (1900) 129 Cal. 263, 61 Pac. 1077; and 2 California Law Review, 332. The early case of Tebbs v. Weatherwax (1863) 23 Cal. 58, is *contra*.

[8] Smith v. Moynihon (1872) 44 Cal. 53; Dunn v. Price (1896) 112 Cal. 46, 44 Pac. 354; Smith v. Goethe (1911) 159 Cal. 628, 115 Pac. 223; Spangenberg v. Nesbitt (1913) 22 Cal. App. 274, 124 Pac. 343.

[9] § 1856.

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companied the execution of the instrument."[10] These provisions, it will be noted, are more restrictive than is the rule as it is commonly expressed, namely, that parol evidence is inadmissible to contradict or add to the terms of a written instrument. The term "parol evidence" is commonly regarded as practically synonymous with oral evidence. The rule under discussion prohibits the admission of more than that class of testimony. Other writings may be excluded when not embraced within the terms of the instrument that is finally agreed upon by the parties as incorporating all of the terms of their agreement. As Professor Thayer pointed out it is "extrinsic" evidence that is excluded regardless of the form that such evidence may take.[11]

Section 1625 of the Civil Code as originally drafted, provided that the execution of a contract in writing supersedes all the "oral" negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument. It was amended in 1905 by striking out the word "oral."[12]

III.

Section 1836 of the Code of Civil Procedure further provides that the rule in question applies "when the terms of the agreement have been reduced to writing by the parties." This frequently raises a nice question as to whether or not the parties intended to reduce all the terms of their agreement to writing.

It is of course settled that where the writing presented to the court is obviously a mere memorandum, the rule excluding extrinsic evidence does not apply.[13] Also when the writing is a mere receipt, though purporting to be "in full," the rule is not applicable.[14] The rule is otherwise, however, when the instrument though in form a receipt is in effect a contract.[15] Likewise it is held that the rule has no application to a collateral

[10] Cal. Civ. Code, § 1625.

[11] 6 Harvard Law Review 325, 331. Also see Wigmore on Evidence, § 2400.

[12] Cal. Stats. 1905, p. 611.

[13] Johnson v. Powers (1884) 65 Cal. 179, 181, 3 Pac. 625, 626; Sivers v. Sivers (1893) 97 Cal. 518, 32 Pac. 571; Ames v. Southern Pacific Co. (1904) 141 Cal. 728, 75 Pac. 310, 99 Am. St. Rep. 98; Peterson v. Chaix (1907) 5 Cal. App. 525, 90 Pac. 948.

[14] Winans v. Hassey (1874) 48 Cal. 634; Jersey etc. Co. v. Whitney (1906) 149 Cal. 269, 86 Pac. 509, 691.

[15] Jersey etc. Co. v. Whitney, supra, n. 14; Lawrence v. Premier Indemnity Co., supra, n. 7.

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agreement upon which the instrument is silent and which agreement does not purport to affect the terms of the writing.[16]

The mere fact that the instrument is silent on a certain subject is not always sufficient, however, to justify the admission of extrinsic evidence of the actual agreement of the parties. The parties may have intentionally excluded certain terms from the writing that was executed by them with the idea that such provisions should not constitute a part of their agreement. When such was their intention, evidence dealing with those subjects upon which the writing is silent is inadmissible.

Moreover it is the settled rule that whatever the law implies from a contract in writing is as much a part of the contract as that which is expressed in it. Hence the writing cannot be varied as to what is implied any more than as to what is expressed.[17]

What then is the test to be applied in determining whether the parties to the written contract intended that the terms expressed therein should be exclusive? The question was passed on in the case of Harrison v. McCormick,[18] in which the court said:

> "The question whether a writing is upon its face a complete expression of the agreement of the parties is one of law for the court, and the rule which governs the court in its determination has been well stated as follows: 'If it imports on its face to be a complete expression of the whole agreement,—that is, contains such language as imports a complete legal obligation,—it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed.' "[19]

The doctrine of this case has been consistently followed by the Supreme Court since that time.[20] It will be noted that the

[16] Sivers v. Sivers, supra, n. 13; Savings Bank v. Asbury (1897) 117 Cal. 96, 103, 48 Pac. 1081, 1083; Williams v. Ashurst Oil etc. Co. (1904) 144 Cal. 619, 78 Pac. 28; Piper v. Kellerman (1916) 32 Cal. App. 128, 162 Pac. 423.

[17] Gardiner v. McDonogh (1905) 147 Cal. 313, 81 Pac. 964; Peterson v. Chaix, supra, n. 13; Standard Box Company v. Mutual Biscuit Company (1909) 10 Cal. App. 746, 751, 103 Pac. 938, 940; Smith-Booth-Usher Co. v. Los Angeles Ice etc. Co. (1917) 175 Cal. 136, 139, 165 Pac. 430, 431.

[18] (1891) 89 Cal. 327, 26 Pac. 830, 23 Am. St. Rep. 469.

[19] Citing Thompson v. Libby (1885) 34 Minn. 377, 26 N. W. 1. See also Naumberg v. Young (1882) 44 N. J. L. 339, 43 Am. Rep. 380.

[20] Bradford Investment Company v. Joost (1897) 117 Cal. 204, 48 Pac. 1083; Johnson v. Bibb Lumber Co. (1903) 140 Cal. 95, 98, 73 Pac. 730; Gardiner v. McDonogh, supra, n. 17; Empire Investment Company v. Mort (1915) 169 Cal. 732, 739, 147 Pac. 960, 963; Peterson v. Chaix, supra, n. 13.

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Supreme Court of Minnesota is cited by our Supreme Court as an authority for the rule that the answer to the question whether the writing is to be deemed complete must depend upon whether it purports upon its face to be complete. But the doctrine has since been abandoned in that jurisdiction. In a later case[21] the Minnesota Supreme Court said:

> "While the writing itself is the only criterion by which the intention of the parties is to be ascertained, yet it is not necessary that the incompleteness of the writing should appear on its face from a mere inspection of it, for it is to be construed in the light of its subject-matter and the circumstances under which and the purposes for which it was executed."

That the doctrine laid down by our Supreme Court on this subject is unsound would seem to have been made clear by Mr. Wigmore. As he says:[22]

> "Whether a particular subject of negotiation is embodied by the writing depends wholly upon the intent of the parties thereto. . . . . This intent must be sought where always intent must be sought; namely, in the conduct and language of the parties and the surrounding circumstances. The document alone will not suffice. What it was intended to cover cannot be known till we know what there was to cover. The question being whether certain subjects of negotiations were intended to be covered, we must compare the writing and the negotiations before we can determine whether they were in fact covered. Thus the apparent paradox is committed of receiving proof of certain negotiations in order to determine whether to exclude them; and this doubtless has sometimes seemed to lower the rule to a quibble. But the paradox is apparent only. The explanation is that these alleged negotiations are received only provisionally. Although in form the witnesses may be allowed to recite the facts, yet in truth the facts will be afterwards treated as immaterial and legally void, if the rule is held applicable. There is a preliminary question for the judge to decide as to the intent of the parties, and upon this he hears evidence on both sides; his decision here, *pro* or *con*, concerns merely this question preliminary to the ruling of law. If he decides that the transaction was covered by the writing, he does not decide that the excluded negotiations did not take place, but merely if they did take place they are nevertheless immaterial."

It would seem that such should be the rule under the express

[21] Potter v. Easton (1901) 82 Minn. 247, 84 N. W. 1011.
[22] Wigmore on Evidence, § 2430. Also see 17 Cyc. 746, 747.

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language of our Code provision[23] which provides that its terms "do not exclude other evidence of the circumstances under which the agreement was made or to which it relates as defined in section 1860." That section provides that:

> "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret."

Pursuant to the apparent purpose of these provisions the Supreme Court held in the case of Balfour v. Fresno etc., Company[24] that:

> "For the purpose of determining what the parties intended by the language used, it is competent to show not only the circumstances under which the contract was made, but also to prove that the parties intended and understood the language in the sense contended for; and for that purpose the conversation between and declarations of the parties during the negotiations at and before the time of the execution of the contract may be shown."

Again in the case of Snyder v. Holt Manufacturing Company[25] the Supreme Court approved of the admission in evidence by the trial court of "prior negotiations" between the parties notwithstanding the objection that the contract there involved purported on its face to be complete. This decision was followed by the District Court of Appeal in Lutweiler etc., Company v. Ukiah etc., Company.[26] The court, in its opinion in that case, said:

> "While parol evidence is not admissible to contradict or vary the written agreement, the court may look, not only to the language of the correspondence evidencing that transaction, but also to the subject matter of the agreement and the surrounding circumstances, in order to be placed, as nearly as practicable, in the position in which the contracting parties were when they entered into the agreement."

But the Supreme Court in denying a petition for a hearing by it took occasion to disapprove of that part of the opinion rendered by the District Court of Appeal, saying[27] that:

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[23] Cal. Code Civ. Proc. § 1856.
[24] (1895) 109 Cal. 221, 41 Pac. 876.
[25] (1901) 134 Cal. 324, 66 Pac. 311.
[26] (1911) 16 Cal. App. 198, 116 Pac. 707.
[27] At 16 Cal. App. 210, 116 Pac. 712.

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> ". . . . . if the opinion of the District Court of Appeal can be construed as holding that a new term can be added to a written contract containing in itself all the essentials of a complete agreement, by resort to the antecedent oral negotiations of the parties, regarded as surrounding circumstances, we do not approve that doctrine, and do not regard it as essential to sustain the judgment of affirmance."

In the case of United Iron Works v. Outer Harbor Dock and Wharf Company[28] the case of Snyder v. Holt Manufacturing Company[29] was cited as authority permitting the introduction of parol evidence of "surrounding circumstances" for the purpose of showing that the parties had not intended to embody all the terms of their agreement in the writing executed by them. The Supreme Court held the evidence inadmissible and said of the case cited:

> "We need not be at pains to discuss this case to the end of determining whether or not appellant's position in this regard is well founded. Suffice it to say that if such a construction is permissible the principle is so contrary to all adjudications, our own as well as those elsewhere, that it cannot be recognized as authority."

Speaking of the language of section 1860 of the Code of Civil Procedure the court said:

> "This rule of evidence is invoked and employed only in cases where upon the face of the contract itself there is doubt and the evidence is used to dispel that doubt, not by showing that the parties meant something other than what they said but by showing what they meant by what they said."[30]

The construction of section 1860 of the Code of Civil Procedure as allowing a resort to surrounding circumstances "only in cases where upon the face of the contract itself there is doubt and the evidence is used to dispel that doubt," would appear to be unnecessarily strict. It is worthy of note that the Supreme Courts of both North and South Dakota, which states have statutory provisions identical with ours, have not found it necessary to restrict the language of their code sections as our Supreme Court has done. In those states evidence of the prior negotiations of the parties is admitted for the purpose of en-

[28] (1914) 168 Cal. 81, 141 Pac. 917.
[29] Supra, n. 25.
[30] Cf. Madera etc. Co. v. Livermore Co. (1918) 56 Cal. Dec. 351; 3 California Law Review, 86.

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abling the court to determine whether the parties intended the terms of their writing to be exclusive, notwithstanding the fact that the writing purports on its face to be complete.[31]

IV.

Section 1856 of the Code of Civil Procedure provides, it will be recalled, that the rule excluding extrinsic evidence of the terms of the writing does not apply where a mistake or imperfection of the writing is put in issue by the pleadings, nor where the validity of the agreement is the fact in dispute, nor where the purpose of the action is to establish illegality or fraud.

The general rule is that in cases where a mistake is relied upon, evidence of such mistake is only admissible where it was one of fact and not of law.[32] Such was the law in this State at one time.[33] Under the provisions of the Civil Code, however, a mistake of law may, under certain circumstances, successfully be interposed.[34]

It is not essential in order to show that a mistake has been made that the suit be one for the express purpose of securing a reformation of the writing. As the Code Commissioners said: "Under the Code of Procedure it is not necessary that the contract should be reformed, but it should be construed according to the actual intent of the parties."[35] In any action in which the agreement is directly involved and a mistake in its terms is set up as a defense, the court may ascertain the actual intention of the parties to it and disregard the erroneous parts of the writing.[36] But a court may not in the absence of a showing of a right of reformation find upon oral testimony that an agreement included provisions which do not appear upon the face of the writing executed by the parties and enforce such provisions as a part of the written contract.[37]

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[31] DePue v. McIntosh (1910) 26 S. D. 42, 127 N. W. 533; Putnam v. Prouty (1913) 24 N. D. 517, 140 N. W. 93.

[32] 17 Cyc. 705.

[33] Smith v. McDougal (1852) 2 Cal. 587; Boggs v. Fowler and Hargrave (1860) 16 Cal. 559.

[34] Cal. Civ. Code § 1576.

[35] Cf. Code Commissioners' note to Cal. Civ. Code § 1640.

[36] Lassing v. James (1895) 107 Cal. 348, 40 Pac. 534; Gardner v. California Guarantee Investment Co. (1902) 137 Cal. 71, 69 Pac. 844. But cf. Irving v. Cunningham (1884) 66 Cal. 15, 4 Pac. 766; Third St. Imp. Co. v. McLelland (1913) 23 Cal. App. 369, 137 Pac. 1089. In these latter cases the court apparently overlooked our code prevision.

[37] Bradbury v. Higginson (1914) 167 Cal. 553, 140 Pac. 254.

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An exception to the rule that mistake must be put in issue by the pleadings is found in cases of what have been termed misdescriptions, a part of the description in a writing being correct and the remainder incorrect. This form of mistake is generally regarded as constituting a latent ambiguity and will be treated by us hereinafter as such.

The mere fact that a person signed a writing without reading it in a mistaken belief as to its contents is not such a mistake as will be allowed to overturn the instrument. Our Supreme Court has thus stated the rule:

> "Where a person enters into an obligation with another upon an equal footing,—i. e., where he does so free from any fraud practiced upon him, and not being under any undue influence, and there are no relations of confidence and trust, and the means of knowledge are equally open to both, and he executes the instrument without reading it or having it read to him, and without exercising the means of knowledge open to him—neither the courts of law nor courts of equity will relieve him from the effects of his folly."[38]

The fact that the party so signing the writing was illiterate is not sufficient to avoid the application of the rule. He should, in such a case, have it read to him by someone in whom he had a right to place confidence.[39]

This rule is subject to the qualification, however, that relief will be granted though the party signing was negligent if the other party knew or suspected the mistake.[40]

Where the contents of a writing are misstated by the adverse party or by his agent, and the person who signed it had a right to rely upon the statement of such person the mistake may be shown, though the party complaining had not read the document before signing it.[41] This is true even though the party who signed was able to read the document, but neglected to do so.[42]

It has also been held that, in cases where a writing was pre-

[38] Placer Co. Bank v. Freeman (1899) 126 Cal. 90, 94, 58 Pac. 388. *Accord,* Metropolitan Loan Assn. v. Esche (1888) 75 Cal. 513, 17 Pac. 675; Kimmell v. Skelly (1900) 130 Cal. 555, 62 Pac. 1067; Harding v. Robinson, supra, n. 5; Burt v. L. A. etc. Assn. (1917) 175 Cal. 668, 166 Pac. 993.

[39] Hawkins v. Hawkins (1875) 50 Cal. 558; Schmidt v. Bekins etc. Co. (1915) 27 Cal. App. 667, 155 Pac. 647.

[40] Wilson v. Moriarity (1891) 88 Cal. 207, 26 Pac. 85; L. A. Co. v. New Liverpool Co. (1906) 150 Cal. 21, 87 Pac. 1029.

[41] Meyer v. Haas (1899) 126 Cal. 560, 58 Pac. 1042.

[42] Calmon v. Sarraille (1904) 142 Cal. 638, 76 Pac. 386.

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pared by the adverse party and its terms are so expressed as not to be intelligible to the person signing it but who signs in reliance on the statement made to him as to its accuracy, parol testimony of such facts is admissible for the purpose of raising an estoppel against the use of the document by the adverse party.[43]

The same principle of estoppel has been applied in actions against insurance companies where the insured gave the company's agent correct answers to the questions asked in the printed application for insurance, but the agent incorrectly wrote in the answers, and the applicant signed the application without reading it.[44]

In the case of Conklin v. Benson[45] our Supreme Court recognized the doctrine that where a person who has no intention of selling his property is induced by some trick or device to sign a paper having such effect, believing that paper to be a substantially different instrument, the paper so signed is in effect as much a forgery as it would have been had the signature actually been forged. The court, however, distinguished the facts in the case before it upon the ground that the plaintiff fully understood that she was signing papers which would convey all her interest in the property involved, and that the difference between the papers she thought she was signing and the papers she actually signed was merely one of detail—one set of papers having precisely the same effect as the other, i. e., the conveyance of her interest in her property.

In all of the cases cited above which involved fraud exercised on the party signing, it was alleged that such person was deceived as to the nature of the document. The extrinsic evidence of the fraudulent representations is allowed in such cases, not as a defense for the purpose of upsetting an agreement that was actually entered into, but for the purpose of showing that no such agreement as that offered in evidence was ever made by the person who signed the document.[46] Misrepresentations other than as to the contents of the document or going rather to the motives for making the contract than to its existence may be admissible or not, depending on the substantive law as to what

[43] Maxson v. Llewellyn (1898) 122 Cal. 195, 54 Pac. 732; Providence Jewelry Co. v. Nagel (1910) 157 Cal. 497, 108 Pac. 312.
[44] Lyon v. United Moderns (1906) 148 Cal. 470, 83 Pac. 804, 4 L. R. A. (N. S.) 247, 113 Am. St. Rep. 296.
[45] (1911) 159 Cal. 785, 116 Pac. 34.
[46] Meyer v. Haas, supra, n. 41.

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misrepresentations will avail to avoid an agreement actually entered into.

Although the writer has not found any California cases in which the theory has been distinctly enunciated, it is the general rule that it may be shown by extrinsic evidence that although a party signed the writing in controversy, it was understood at the time that it should not become operative or binding upon him until some condition precedent, not appearing upon the face of the writing, was complied with.[47]

Such a case is to be distinguished from one involving a condition subsequent on the non-performance of which the written agreement shall become void. Such an understanding may not be shown, as the execution of the agreement is thereby admitted, and the attempt is to add to its terms a provision not found in the writing.[48] In the former case, the evidence is admitted solely for the purpose of showing that no agreement was ever consummated.

Although this principle has not been expressly stated in California, an application of it is found in the settled rule that it may be shown that a deed or other instrument was delivered in escrow to take effect upon the performance of a certain condition.[49] The non-performance of the condition may not be shown, however, when the delivery was to the grantee himself.[50]

There have been several other decisions in this State involving facts which came near to constituting conditions precedent but which were decided on another ground. Thus in the case of Billings v. Everett,[51] the maker of a promissory note was permitted in an action brought on the note to show that he had given it in consideration of the oral promise of the payee to dig an irrigation ditch across the land of the former, which was to be completed by a certain date, it being understood that if the ditch was not completed by that time, the maker should not be liable on the note. The Supreme Court held that the evidence

[47] Wigmore on Evidence, § 2408-2410; Williston's Wald's Pollock on Contracts, p. 311.

[48] Stanley v. White (1896) 160 Ill. 605, 43 N. E. 729.

[49] Cannon v. Handley (1897) 72 Cal. 133, 13 Pac. 315; McDonald v. Huff (1888) 77 Cal. 279, 19 Pac. 499; Wittenbrock v. Cass (1895) 110 Cal. 1, 42 Pac. 300; Drinkwater v. Hollar (1907) 6 Cal. App. 117, 91 Pac. 664.

[50] Cal. Civ. Code § 1056; Bias v. Reed (1914) 169 Cal. 33, 145 Pac. 516. But cf. Black v. Sharkey (1894) 104 Cal. 279, 37 Pac. 939. The doctrine laid down in Bias v. Reed has been criticized by Mr. Wigmore; cf. Wigmore on Evidence, § 2408.

[51] (1878) 52 Cal. 661.

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was admissible for the purpose of showing a failure of consideration.[52]

The same doctrine was applied in a subsequent case notwithstanding the fact that the completion of the work for which the note was given was expressly termed by the Supreme Court, "an absolute condition precedent" to the note's becoming effective.[53]

The Supreme Court has, however, limited the doctrine admitting parol evidence for the purpose of showing the failure of a consideration expressed in the writing, and has refused to allow the evidence for the purpose of proving an additional consideration not expressed in the writing and a failure thereof.[54]

The Code of Civil Procedure provides,[55] it will be recalled, that extrinsic evidence is admissible in cases of fraud and mistake and of imperfections in the writing and also where the validity of an agreement is the fact in dispute. By implication it would appear that in other cases such evidence should not be admissible. We have seen that such evidence is admissible for the purpose of showing a condition precedent to the writing becoming effective. There are other cases in which extrinsic evidence is also allowed which are not covered by the letter of the statute. An instance of this is found in the application of the rule that what purports to be a deed may be shown to have been intended merely as a mortgage. This is allowed, as pointed out by Mr. Justice Field, upon the theory that the evidence does not contradict or vary the instrument but shows facts *dehors* the instrument, which create an equity superior to its terms.[56]

Parol evidence is likewise admitted upon the same theory for the purpose of showing that a deed conveying property was intended to create a trust in the grantee,[57] and also to show that a written assignment of personal property though absolute on its face was in fact made in trust for the benefit of others than the assignee.[58]

Moreover, even though there was no fraud or mistake in con-

[52] Jefferson v. Hewitt (1894) 103 Cal. 624, 37 Pac. 638; Muir v. Hamilton (1908) 152 Cal. 634, 636, 93 Pac. 857, 858; *accord*.
[53] McLaughlin v. Clausen (1890) 85 Cal. 322, 24 Pac. 636.
[54] Langan v. Langan (1891) 89 Cal. 186, 26 Pac. 764.
[55] § 1856.
[56] Pierce v. Robinson (1859) 13 Cal. 116, 131. Cf. 2 California Law Review, 147.
[57] Brison v. Brison (1888) 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189.
[58] Lockwood v. Canfield (1862) 20 Cal. 126.

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nection with the execution of the writing, nevertheless, if one party to it attempts to enforce it for a different purpose than that for which it was actually given and contrary to an oral understanding had between the parties at the time of the execution of the writing, parol evidence of such understanding is admissible. The reason given is that to sanction the use of the writing for the purpose expressed in it, in the face of the parol agreement, would be to uphold fraud and bad faith.[59]

V.

Our Code of Civil Procedure[60] further provides, it will be recalled, that evidence is admissible to explain "an extrinsic ambiguity." Thus has been perpetuated the obsolescent distinction of Lord Bacon between latent and patent ambiguities.

> "There be two sorts of ambiguities of words; the one is *ambiguitas patens,* and the other, *latens*: *patens* is that which appears to be ambiguous upon the deed or instrument; *latens* is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity. *Ambiguitas patens* is never holpen by averment, and the reason is, because the law will not couple and mingle matter of specialty, which is the higher account, with matter of averment, which is of inferior account in law; for that were to make all deeds hollow, and subject to averment, and so, in effect, that to pass without deed, which the law appointeth, shall not pass but by deed. Therefore, if a man give land to J. D., *et* J. S., *et haeredibus,* and do not limit to whether of their heirs, it shall not be supplied by averment to whether of them the intention was the inheritance should be limited. But if it be *ambiguitas latens,* then otherwise it is; as if I grant my manor of S. to J. F. and his heirs, here appeareth no ambiguity at all; but if the truth be that I have the manors both of south S and north S., this ambiguity is matter in fact; and, therefore, it shall be holpen by averment, whether of them was that the party intended should pass."[61]

Many courts today agree with Professor Thayer that "Bacon's Maxim was an unprofitable subtlety. In truth the only patent

[59] Murray v. Dake (1873) 46 Cal. 644; Martin v. Parsons (1874) 49 Cal. 94; Isenhoot v. Chamberlain (1881) 59 Cal. 630; Eva v. McMahon (1888) 77 Cal. 467, 19 Pac. 872; *accord.*

[60] § 1856.

[61] Quoted in Mesick v. Sunderland (1856) 6 Cal. 297, 312.

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ambiguity that was not open to explanation by extrinsic matter was one that in the nature of things was not capable of explanation. Anything which was capable of it might be explained."[62]

As early as 1858, Mr. Justice Field quoted the following language with approval:

> "It will not do to say, therefore, that a patent ambiguity (meaning thereby merely an ambiguity patent or appearing on the face of the instrument) cannot be explained by evidence *aliunde;* though such remarks are frequently found in the books."[63]

But the distinction between latent and patent ambiguity having been recognized in our code, it is, of course, found in our cases. The rule is now said to be settled that parol evidence is admissible to explain or remove a latent ambiguity,[64] but not ordinarily to cure a patent ambiguity.[65]

The rule excluding parol evidence in the case of patent ambiguities is not however, an unyielding one, as was pointed out by Justice Field. In fact, the exceptions are so well recognized in this State as to make it doubtful whether it can properly be said that there is any general rule at the present day excluding extrinsic evidence in the case of patent ambiguities. Thus in the case of Preble v. Abrahams[66] the Supreme Court had occasion to pass upon the admissibility of extrinsic evidence for the purpose of explaining the meaning and intention of the parties in contracting for the sale of "forty acres of the eighty-acre tract at Biggs." It was held that the evidence was admissible. The court stated:[67]

> "Parol evidence is always admissible to explain the surrounding circumstances, and situation and relations of the

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[62] Thayer, Preliminary Treatise on Evidence at the Common Law, p. 424.

[63] Jenny Lind Co. v. Bower (1858) 11 Cal. 194, 199.

[64] Mesick v. Sunderland, supra, n. 61; Brannan v. Mesick (1858) 10 Cal. 95; Piper v. True (1869) 36 Cal. 606; Board of Education v. Keenan (1880) 55 Cal. 642; Estate of Donnellan (1912) 164 Cal. 14, 127 Pac. 166; Fireman's Fund Insurance Co. v. Aachen etc. Ins. Co. (1906) 2 Cal. App. 690, 88 Pac. 1098.

[65] Mesick v. Sunderland, supra, n. 61; Brannan v. Mesick, supra n. 64; People v. S. F. Savings Union (1866) 31 Cal. 132; Poorman v. Mills & Co. (1870) 39 Cal. 345, 2 Am. Rep. 451; Brandon v. Leddy (1885) 67 Cal. 43, 7 Pac. 33; Hall v. Bartlett (1910) 158 Cal. 638, 112 Pac. 176; Walker v. City of Los Angeles (1914) 23 Cal. App. 634, 139 Pac. 89; Scott v. Woodworth (1917) 34 Cal. App. 400, 167 Pac. 543. Cf. Union Lumber Co. v. Simon (1907) 150 Cal. 751, 89 Pac. 1077.

[66] (1891) 88 Cal. 245, 26 Pac. 99, 22 Am. St. Rep. 301.

[67] At p. 250.

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> parties, at and immediately before the execution of the contract, in order to connect the description with the only thing intended, and thereby to identify the subject-matter, and to explain all technical terms and phrases used in a local or special sense."

The following language of Professor Pomeroy was quoted with approval:[68]

> "It is not strictly accurate to say that the subject-matter must be absolutely certain from the writing itself, or by reference to some other writing. The true rule is, that the situation of the parties and the surrounding circumstances, when the contract was made, can be shown by parol evidence, so that the court may be placed in the position of the parties themselves; and if then the subject-matter is identified, and the terms appear reasonably certain, it is enough."

This case has also several times been approved by the Supreme Court.[69]

Recently the Supreme Court intimated that the rule excluding parol evidence in the case of patent ambiguities is not inflexible. Said that court in the case of Payne v. Commercial National Bank of Los Angeles:[70]

> "It may not be correct to say that a *prima facie* patent ambiguity can never be explained by evidence *aliunde,* for it may be that such evidence will sometimes show that the apparent uncertainty in the language used does not in truth exist."

There are numerous cases in this State holding that extrinsic evidence is admissible to identify the subject-matter of an agreement, where it is referred to in indefinite terms.[71]

An ambiguity may appear in a writing by reason of a misdescription, a term appearing which, when applied to the subject-matter, is found not to fit in all respects. The general rule in such cases is that extrinsic evidence of the circumstances under which the writing was executed may be admitted and the doubtful

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[68] At p. 251.

[69] Towle v. Carmelo etc. Co. (1893) 99 Cal. 397, 33 Pac. 1126; Higgins v. Manson (1899) 126 Cal. 467, 58 Pac. 907, 77 Am. St. Rep. 192; Brewer v. Horst Co. (1900) 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240; Joyce v. Tomasini (1914) 168 Cal. 234, 142 Pac. 67.

[70] (1917) 177 Cal. 68, 169 Pac. 1007.

[71] Ontario D. F. G. Assn. v. Cutting F. P. Co. (1901) 134 Cal. 21, 66 Pac. 28, 86 Am. St. Rep. 231; Gardiner v. McDonough, supra, n. 17; Germain Fruit Co. v. Armsby Co. (1908) 153 Cal. 585, 96 Pac. 319; Willmon v. Peck et al (1907) 5 Cal. App. 665, 91 Pac. 164; Sanchez v. Yorba (1908) 8 Cal. App. 490, 97 Pac. 205.

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term of the writing applied to such person or thing as is aptly described by part of the description.[72]

This situation is most frequently presented in cases of inaccurate descriptions in deeds. Thus where a conveyance described a right of way as "a way to, in and for the ditch called Mountain Brow Water Company" and also as extending over "land owned by Spicer" and the second description was false, it was held that the latter description could be rejected.[73] This doctrine has been embodied in the Code of Civil Procedure,[74] which provides that:

> "Where there are certain definite and ascertained particulars in the description, the addition of others which are indefinite, unknown, or false, does not frustrate the conveyance, but it is to be construed by the first-mentioned particulars."

The same principle has been applied in the cases of a misdescription of a devisee named in a will.[75]

As was pointed out above, the Code of Civil Procedure[76] provides that for the purpose of explaining an ambiguity, the circumstances under which it was made, including the situation of the subject of the instrument and of the parties to it, may be shown. As we have seen, however, this language has been construed as applicable only to cases where upon the face of the instrument itself there is doubt and the evidence is used to dispel that doubt.[77] But it has been frequently held if the language be fairly susceptible of either of two interpretations contended for without doing violence to its usual and ordinary import or to some established rule of construction, then an ambiguity arises, in which case extrinsic evidence may be resorted to for the purpose of explanation. In the leading case in which this rule was enunciated, it was also recognized that:

> "For the purpose of determining what the parties intended by the language used, it is competent to show not only the circumstances under which the contract was made but also to prove that the parties intended and understood the lan-

[72] Wigmore on Evidence, § 2476.
[73] Reed v. Spicer (1864) 27 Cal. 57; Irving v. Cunningham (1884) 66 Cal. 15, 4 Pac. 766; Hall v. Bartlett (1910) 158 Cal. 638, 112 Pac. 176; *accord.*
[74] § 2077-1.
[75] Estate of Donnellan, supra, n. 64.
[76] § 1860.
[77] United Iron Works v. Outer Harbor Dock & Wharf Co., supra, n. 28.

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> guage in the sense contended for, and for that purpose the conversation between and declarations of the parties during the negotiations at and before the time of the execution of the contract may be shown."[78]

The rule that extrinsic evidence may be resorted to for the purpose of explaining the sense in which language susceptible of either of two interpretations in fact was used has frequently been laid down.[79]

Thus where a will purports to make a gift to "children" and it appears that no children were living at the time of the execution of the will, extrinsic evidence may be given to show that a gift to grandchildren was intended.[80]

The Code of Civil Procedure[81] also provides that:

> "The terms of a writing are presumed to have been used in their primary and general conception, but evidence is, nevertheless, admissible that they have a local, technical, or otherwise peculiar signification and were so used and understood in the particular instance, in which case the agreement must be construed accordingly."[82]

It was held prior to the adoption of the code that allowing extrinsic evidence of the meaning of terms or expressions peculiar to a particular business does not violate the rule that patent ambiguities cannot be explained by parol.[83]

The cases in this State dealing with the question whether it can be shown that by reason of a custom or usage in a special line of business a meaning out of the ordinary should be given to a term in a writing are by no means clear. In two early California decisions the well-known English case of Smith v. Wilson[84] was cited with approval.[85] In that case it was held that parol evidence was admissible to show that by the custom of the

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[78] Balfour v. Fresno Co., supra, n. 24.

[79] Williams v. Ashurst Oil etc. Co., supra, n. 16; Estate of Bell (1908) 153 Cal. 331, 95 Pac. 372; Jersey Farm Co. v. Atlanta Realty Co. (1912) 164 Cal. 412, 129 Pac. 593; Firemen's Fund. Ins. Co. v. Aachen Ins. Co., supra, n. 64; Peterson v. Schaix, supra, n. 13; S. F. Clearing House v. MacDonald (1912) 18 Cal. App. 212, 122 Pac. 964.

[80] In re Schedel (1887) 73 Cal. 594, 15 Pac. 297; Rhoton v. Bleven (1893) 99 Cal. 645, 34 Pac. 513; Estate of Willson (1915) 171 Cal. 449, 153 Pac. 927.

[81] § 1861.

[82] Cf. also Cal. Code Civ. Proc. §§ 644, 1645.

[83] Reamer v. Nesmith (1868) 34 Cal. 624.

[84] (1832) 3 B. & Ad. 728, 110 Eng. Rep. R. 266.

[85] Jenny Lind Co. v. Bower, supra, n. 63; Reamer v. Nesmith, supra, n. 83.

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country the word "thousand" might be construed as meaning twelve hundred. Likewise in the case of Morrison v. Wilson[86], the court stated that:

> "The question then comes to this, have the parties to a written contract the right to set aside the general sense of the words which they use, and for the purposes of the contract to assign to them another and different meaning, by convention? That they have both the right and the power to do this there can be no question. . . . . If they see fit to agree that mile shall stand for league, or grant, bargain and sell for quitclaim, or even black for white, however we might marvel at the caprice, we could not question the power."

In the case of Callahan v. Stanley[87] the Supreme Court had occasion to pass upon a lease which provided that the "stubble" of the grain grown by the tenant should belong to the landlord. The landlord sought to introduce evidence that by the custom of the country "stubble" included and designated whatever grain was left on the ground uncut after the harvest. The tenant objected on the ground that the term "stubble" was not obscure in meaning and was defined to mean "The stumps of wheat, rye, barley, oats or buckwheat left in the ground; the part of the stalk left by the scythe or sickle." The Supreme Court held the evidence admissible, saying:

> "If there was an existing usage among farmers as to the meaning of the word 'stubble,' when this contract was made, it must be inferred that the contracting parties, being farmers, contracted with reference to it, and that they used the word in the broader meaning which was given to it by that usage, and not in the ordinary or popular sense. Evidence of such usage and meaning was, therefore, admissible to define and explain the peculiar and local meaning of the word as it was used in the contract, and the court below should have overruled the objection to the offer made by the plaintiff."

In the case of Higgins v. California etc. Company,[88] it was held that evidence to show that the term "gross ton" was intended to have a special meaning other than that given to it by the Political Code was inadmissible. The court based its decision on the ground that there was nothing in the instrument indicating an intention to give to the term the special meaning

[86] (1866) 30 Cal. 344, 348.
[87] (1881) 57 Cal. 476.
[88] (1895) 109 Cal. 304, 41 Pac. 1087.

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contended for, and that, moreover, the practical construction of the parties indicated that they intended the phrase to bear its ordinary meaning.

The same contract came before the Supreme Court for construction a few years later in Higgins v. California Petroleum Company.[89] The trial court had found that the term "gross ton" was used as meaning twenty-two hundred forty pounds. The appellant contended that the term was defined by statute, and, being unambiguous, parol evidence for the purpose of proving that the term carried another meaning was inadmissible. The court held that the provisions of section 1861 of the Code of Civil Procedure were as applicable to a term indicating a statutory weight as to any other term in a writing. Since the appeal was on the judgment roll, the court held that evidence might have been properly introduced before the trial court showing that a custom or usage existed; that the meaning contended for had been given to the term "gross ton," and that for the purpose of supporting the judgment, it would be presumed that such evidence had been introduced.

But in the case of Hale Bros. v. Milliken,[90] evidence that in the structural steel business there existed a custom whereby the term "pound" was given a special meaning different from that given to it by the Political Code was held to be inadmissible, although the contract was made between dealers in that material. The court distinguished the case of Higgins v. California Petroleum Company[91] on the ground that the word "gross" in the phrase "gross ton" there involved was not used in the statute and had no legal signification; whereas the word "pound" was defined by the statute. The District Court of Appeal further stated that the Supreme Court had expressed the rule applicable too broadly in its decision. The conclusion of the former court was that contracts will be conclusively presumed to have been made in reference to the statute, unless the parties themselves have agreed or indicated in their contracts that their execution is to be governed by some usage of trade or custom prevailing in the community where they were made or their terms are to be per-

[89] (1898) 120 Cal. 629, 52 Pac. 1080.

[90] (1907) 5 Cal. App. 344, 90 Pac. 365. A petition for rehearing by the Supreme Court was denied by that body. *Accord*, Standard American Dredging Co. v. Oakland (1916) 30 Cal. App. 237, 157 Pac. 833.

[91] Supra, n. 89.

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formed. The court also enunciated the broad rule that evidence cannot be introduced of a custom or usage when the same contradicts the plain and unambiguous words of a written contract.

It is true that the rule has been laid down by the Supreme Court that it is not competent to vary or contradict a written contract by parol proof of a custom when the contract is certain in its terms.[92] But a court cannot tell whether or not the writing is certain in its terms until it has provisionally admitted evidence offered, which tends to prove that the terms used have a local or otherwise peculiar signification[93] and were actually understood and used in that particular sense. In other words, evidence going to questions as to the meaning of the language employed in the light of a special usage, should be admitted. But if after the evidence is introduced and considered the court concludes that no such meaning attaches to the language employed, or, that it was not used and understood by all the parties in that peculiar sense, the evidence should be disregarded.[94]

The rule followed by many courts, and apparently applied by the District Court of Appeal in the case of Hale Bros. v. Milliken[95] is that evidence cannot be introduced to vary an apparently plain meaning.

But in this State, as has been pointed out, the code provides[96] that proof that parties knowingly used a term in a sense not usually given to it is admissible.

Mr. Wigmore considers the rule against disturbing a plain meaning to be unsound in theory and in most cases objectionable from the standpoint of policy.[97]

Mr. Justice Holmes does not go so far. Says that distinguished jurist:

> "I do not suppose that you could prove for purposes of construction as distinguished from avoidance, an oral declaration or even an agreement that words in a dispositive instrument, making sense as they stand, should have a different meaning from the common one; for instance, that the parties to a contract orally agreed that when they wrote five hundred feet it should mean one hundred inches, or that Bunker Hill Monument should signify Old South Church.

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[92] Witters v. Moore (1903) 140 Cal. 591, 74 Pac. 159.
[93] Cal. Code Civ. Proc., § 1861.
[94] Holloway v. McNear (1889) 81 Cal. 154, 22 Pac. 514.
[95] Supra, n. 90.
[96] Cal. Code Civ. Proc., § 1861.
[97] Wigmore on Evidence, § 2462.

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> On the other hand, when you have the security of a local or class custom or habit of speech, it may be presumed that the writer conforms to the usage of his place or class when that is what a normal person in his situation would do."[98]

The rule that should obtain in this State would seem to be settled and properly settled by the code section above referred to.[99] If it can be shown that a certain term ordinarily having a plain meaning was actually "used and understood" by the parties in another sense, there would seem to be no objection on the ground of expediency or policy to the admission of evidence tending to prove that fact. Especially is this true in view of the fact that the code specifically provides that the terms employed in a writing are presumed to have been used "in their primary and general acceptation," and that such a presumption is itself evidence that must be weighed against the evidence of the special meaning attributed to the language used.[100] The rule was correctly stated by the Supreme Court in the recent case of Shean v. Weeks:[101]

> "The ordinary meaning of words cannot be changed except by proof of general usage by those engaged in the particular trade, or by proof that the parties to the contract used them in the special sense contended for."

It will be noted that the court states that "proof of general usage by those engaged in the particular trade," or in the alternative, proof of an express intent on the part of those using the language in question is essential to vary the plain meaning of the terms employed. In the former case, a knowledge of the special usage will be presumed. When the usage is not general to those engaged in the particular trade, an intent to use the language in the special sense contended for must be shown.

This distinction is generally recognized,[102] although it is sometimes overlooked, as seems to have occurred in the drafting of the opinion in the recent case of Van DeGrift v. Mullen.[103]

Even though an ambiguity appears in the language of a

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[98] The Theory of Legal Interpretation, 12 Harvard Law Review, 417, 420.

[99] Supra, n. 93.

[100] People v. Milner (1898) 122 Cal. 171, 54 Pac. 833; Thompson v. Davis (1916) 172 Cal. 491, 157 Pac. 595.

[101] (1917) 176 Cal. 592, 596, 169 Pac. 231, 232.

[102] 17 C. J. 458; Corey v. Struve (1911) 16 Cal. App. 310, 116 Pac. 975.

[103] (July 8, 1919) 29 Cal. App. Dec. 173.

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writing, it is the general rule, with certain exceptions, that evidence of declarations of the intent of the parties to it is inadmissible. This rule is generally based on the ground that it would be dangerous to allow such evidence on account of the possibility of its being used by a jury as a rival subject matter of interpretation in disregard of the terms of the writing itself.[104]

It has also been suggested by Mr. Wigmore that the reason for the rule is the same as for the parol evidence rule itself; namely, that:

> "When a transaction has been even voluntarily embodied in a single document, no other utterance of intent or will on the same subject can be given legal effect."[105]

But since such statements of intent might conceivably be used solely for the purpose of throwing light on the language actually employed by the writer, it would seem that the explanation of Professor Thayer that the rule is based on the expediency of allowing such evidence is the sounder one.

The rule excluding proof of declarations of the intent of a testator has been embodied in our Civil Code.

> "When, applying a will, it is found that there is an imperfect description, or that no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence; but evidence of declarations of the testator as to his intentions can not be received."[106]

To the rule excluding such declarations there are today two generally recognized exceptions. The first of these exceptions exists in cases where there are two persons or things equally answering the description, frequently referred to as cases of equivocation. The second exception exists in cases of misdescription.

In drafting the code section quoted above neither of these exceptions was recognized. Our Supreme Court admitted in the case of Estate of Dominici[107] that in this respect our code provision is not in accord with the general rule. Hence, it was held that the rule "will not be extended therefore beyond its actual

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[104] Thayer, Preliminary Treatise on Evidence at the Common Law, p. 440.
[105] Wigmore on Evidence, § 2471.
[106] Cal. Civ. Code, § 1340.
[107] (1907) 151 Cal. 181, 90 Pac. 448.

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language and will be held to apply to the mere incidental fugitive utterances or declarations of intent, as distinguished from specific instructions, as to testamentary disposition, which it may be proved were given."

The same limitation has been placed on the code provision in the case of a misdescription of a legatee.[108]

The Supreme Court has recently set forth the limitations to which courts are subject in attempting to ascertain the intention of a writer. It was there stated that:

> "No authority sustains the proposition that under the guise of construction or explanation a meaning can be given to the instrument which is not to be found in the instrument itself, but is based entirely upon direct evidence of intention independent of the instrument. It has been well said that in the admission of extrinsic evidence, the line which separates evidence which aids the interpretation of what is in the instrument from direct evidence of intention, independent of the instrument, must be kept steadily in view, the duty of the court being to declare the meaning of what is written in the instrument and not what was intended to be written."[109]

In this somewhat summary review of our decisions on the subject discussed, one fact must have been observed. The codification of the so-called parol evidence rule has not prevented our courts from following the general trend of the decisions in the other states, at times in complete disregard of the intent of those who framed our code provisions. Nor has such codification prevented our courts from laying down certain heterodox principles which the plain language of the code would seem to have rendered unnecessary.

Robert L. McWilliams.

San Francisco, California.

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[108] Estate of Little (1915) 170 Cal. 52, 148 Pac. 194.
[109] Payne v. Commercial Bank of Los Angeles, supra, n. 70.

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Editorial Notes

SCHOOL OF JURISPRUDENCE NOTES

PROFESSOR MAX RADIN, LL. B. New York University 1902, Ph. D. Columbia University 1910, and Professor G. H. Robinson, S. J. D. Harvard Law School 1916, have been appointed members of the Faculty of the School of Jurisprudence. Professor Radin will give the courses in Roman Law, Comparative Law, Sales and Suretyship. Professor Robinson will have the courses in Elementary Law, Criminal Law, and the Law of Public Service.

Alexander M. Kidd, Matthew C. Lynch, Austin T. Wright and John U. Calkins, Jr., have returned after a year of absence on leave. Edward Elliott, Professor of International Law, has taken a year's leave of absence, and the course in International Law is now being given by Charles E. Martin, Ph. D. Columbia University 1918. Professor F. S. Philbrick, for four years a member of the Faculty of this School, has resigned to accept a professorship in Northwestern University Law School.

During the Summer Session the course in Contracts was given

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by Arthur L. Corbin, Justus S. Hotchkiss, Professor of Law, School of Law, Yale University. Professor Leslie J. Ayer of the Law School of the University of Washington gave a course in Commercial Law and Professor Matthew C. Lynch of this school gave Equity II. Several courses in Criminology were offered under Jau Don Ball, M. D., Professor of Mental and Nervous Diseases, Oakland School of Medicine and Surgery; Edward O. Heinrich, City Manager and ex-officio Director of Public Safety, Boulder, Colorado; August Vollmer, Chief of Police of Berkeley and Francis L. Ingersoll and A. R. Mehrtens of Berkeley.

M. C. L.

A Review of Recent Cases in the California Courts for the Quarter Ending August, 1919

I. Constitutional and Administrative Law, Including Procedure.

A CURIOUS fact was adverted to in a review of the California case law published in this Review last September, namely, the paucity of decisions involving questions arising out of the war. This singular phenomenon is even more observable in the cases decided during the last quarter. A student looking for historical material concerning the war would find nothing to illustrate it in the many decisions handed down by the Supreme Court of California and the five other courts of appeal in this state.

The most important decision in the field of constitutional law is *Frost v. City of Los Angeles*,[1] holding unconstitutional the provisions of the Statute of 1913, p. 793, requiring suppliers of water for human consumption to procure permission from the state board of health to continue their service, and further authorizing the board to grant permission only where it finds that the water being supplied is "the purest and most healthful obtainable." The statute also provided that any private citizen might enjoin the continuance of such service where no permission was thus obtained. The plaintiff under the authority of the statute sought to restrain the City of Los Angeles from sup-

[1] (Aug. 11, 1919) 58 Cal. Dec. 119.

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plying its citizens with water under the authority of the statute referred to. As the learned justice who delivered the opinion of the court said, "Apparently this part of the law is based on the theory that it is better for the urban population of the State that they should die of thirst than that they should quench it with ordinary healthful water." The Frost case will probably be cited hereafter not only upon the question of the extent of the police power, but also upon the point whether and how far it is permissible for a court of equity in cases of public nuisance to balance convenience in issuing or refusing injunctive relief. The Supreme Court, by a decision participated in by all the members of the court, declares the supremacy of the judicial power in administering equitable relief—the legislature apparently cannot confer upon a private citizen the power to bring a bill to abate a public nuisance so as to make the bill in effect one brought by a public official. The rights of the citizen are to be measured by the ordinary rules of equity, not by those applicable to the sovereign suing by its representative, the attorney general.

There are other cases involving questions of constitutional law, but the only one we have noted as of special interest is that of *Beck v. Ransome-Crummey Company*,[2] and that is interesting not so much for the point decided as for the *dictum*, based on Murray v. Hoboken,[3] that "due process of law is the exact equivalent of the law of the land as used in the Magna Charta." This is like Dr. Johnson's definition of a net as "something meticulated or decussated at equal intervals with interstices between the intersections," a case of *ignotum per ignotius*. Mr. McKechnie's able work on Magna Charta tells as well as can be told at the present day what "lex terrae" meant in 1215; it certainly did not mean anything so modern as our "due process of law."

The increasing activity of governmental agencies continues to occupy much of the courts' attention. A tendency is observable toward giving more elasticity to the management of municipal corporations. Thus, in *Cary v. Long*,[4] it is held that municipal corporations may enter into arbitration proceedings with the same freedom as individuals; *Skidmore v. West*[5] recog-

[2] (Aug. 14, 1919) 29 Cal. App. Dec. 562.
[3] (1855) 18 How. 272, 15 L. Ed. 372.
[4] (Aug. 15, 1919) 29 Cal. App. Dec. 579.
[5] (July 30, 1919) 29 Cal. App. Dec. 441.

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nizes the power of a county board of supervisors to make a contract to employ private individuals on a percentage basis to collect data for the purpose of collecting taxes. The authorization comes from section 3897 of the Political Code, which abrogates the effect of the decision to the contrary in House v. Los Angeles County.[6]

The power of a municipal corporation to annex territory is placed beyond successful attack by ordinary action at law or bill in equity by the decision in *Coe v. City of Los Angeles*,[7] which holds that a citizen and tax payer cannot attack the legality of proceedings for annexation, but that the State must do so through *quo warranto* proceedings. Ordinarily, of course, the State will not take measures to interfere in such matters.

In *Boyd v. City of Sierra Madre*,[8] involving the validity of a municipal ordinance, Finlayson, P. J., is obliged to invoke Milton's Paradise Lost to find a suitable description for the horrors of the ass's bray. Even a small town may protect its citizens from assaults on their ears by these offensive sounds by passing an ordinance regulating the keeping of burros and mules. Nor is the ordinance invalid for discrimination where a power of granting permission to keep the animals is left to the discretion of officials. It cannot be assumed that the latter will necessarily abuse their discretion. Such decisions as this are paving a broad way for the introduction of better ideals and practices in local government.

The non-liability of the sovereign which has in certain aspects been criticized in this Review and elsewhere[9] finds illustration in *Dillwood v. Riecks*.[10] Though municipal corporations have in large measure become subject to the duties which apply to individuals, as was strikingly illustrated in *Chafor v. City of Long Beach*,[11] counties are political divisions of the State and subject to the rule of non-liability. The case of Dillwood v. Riecks, while it absolves the county from liability for loss of a stallion destroyed by the negligence of those in charge of an

[6] (1894) 104 Cal. 73, 37 Pac. 796.
[7] (July 29, 1919) 29 Cal. App. Dec. 453.
[8] (June 10, 1919) 28 Cal. App. Dec. 1366.
[9] Austin T. Wright, Government Ownership and the Maritime Lien, 7 California Law Review, 242; Harold J. Laski, The Responsibility of the State in England, 32 Harvard Law Review, 447; John M. Zane, A Legal Heresy, 13 Illinois Law Review, 255 (Celebration Legal Essays in Honor of John H. Wigmore.)
[10] (July 11, 1919) 29 Cal. App. Dec. 519.
[11] (1917) 174 Cal. 478, 163 Pac. 670, Ann. Cas. 1918D 106.

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agricultural park who set fire to dry grass near its stall, places responsibility upon the officers of the county. It extends somewhat the doctrine of Doeg v. Cook,[12] and makes the officials liable for negligent performance of duty, whether the performance of such duty involves discretion or not. The correctness of the decision is not questioned, but the justice and policy of such a state of the law may well be criticized. Now that the theory of sovereignty exemplified in Prussian political philosophy has been so thoroughly discredited, is it not desirable that the whole question of liability of the State and its political subdivisions for wrongs done to individuals should be re-examined? It is indeed strange that England and America, the homes of political liberty, should harbor the doctrine of non-liability of the sovereign—a theory long discarded in the legislation of continental Europe.[13]

The *de facto* doctrine, an invention of judges to do substantial justice where the rights of individuals are affected by officials, finds exemplification in *Page v. Mintzner*.[14] This case holds that a public officer may, so far as the public is concerned, perform valid acts, though he has neither filed his official bond nor taken his oath. Holmes' Common Law is cited by Mr. Justice Brittain to the effect that "the law is administered by able and experienced men who know too much to sacrifice common sense to a syllogism."

An important point in administrative law is decided in *Yolo Water and Power Company v. The Superior Court*.[15] The superior court has no jurisdiction, so this case decides, to hear and determine an action brought by a district attorney in the name of the State to restrain a diversion of public waters, constituting in fact a public nuisance, where the railroad commission has given permission to make such diversion. Private individuals might have refuge in the fourteenth amendment against an outrageous interference with their property to an extent such as that described in the Yolo Water and Power Company case, but could the State invoke the federal constitution upon the theory of *dominium ultimum* in the waters of the State?[16] An almost absolute power in the most irresponsible form is vested in the

[12] (1899) 126 Cal. 213, 58 Pac. 707, 77 Am. St. Rep. 171.
[13] John M. Maguire, State Liability for Tort, 30 Harvard Law Review, 20, 22.
[14] (Aug. 15, 1919) 29 Cal. App. Dec. 576.
[15] (Aug. 8, 1919) 29 Cal. App. Dec. 507.
[16] Georgia v. Tennessee Copper Co. (1907) 206 U. S. 230, 51 L. Ed.

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railroad commission, if this decision be sound, as, indeed, it seems to be. Apparently it will be necessary to retrace some of the steps taken in the direction of turning over affairs of government to commissions.

The usual number of employers' liability cases is found among the decisions of the last quarter, though none seem to be particularly novel or of wide interest. The same may be said as to the criminal cases. Ought not some check be placed upon the reporting of opinions presenting no aspects of general interest?

Reversals for errors in procedure are rare, both in criminal and in civil cases. *McLaughlin v. Los Angeles Railway Corporation*[17] is, we believe, the only case during the quarter reversed for errors in the trial court in the handling of the admission of evidence. The case was tried without a jury, but the decision of the trial court was set aside by a District Court of Appeal because of an erroneous procedure in the method of impeaching witnesses and in cross-examination. The phenomenon of reversing a case for such errors is so rare nowadays as to elicit comment. The legal craving for technical accuracy, however, may still be satisfied to some extent in appellate practice. Thus, an unfortunate clerk who put a notice of appeal under the door of the clerk's office, which had been closed for the day, was responsible for the decision in *W. J. White Company v. Winton*,[18] dismissing an appeal for failure to file the notice in time.

Upon the subject of parties defendant, *Patterson Glass Company v. Thomas et al.*[19] presents the peculiarity of permitting an unincorporated labor association to be made defendant. It has always been supposed that section 388 of the Code of Civil Procedure marked the limit of a plaintiff's right to sue unincorporated associates. Though a similar decision in England a few years since produced a revolution in labor legislation, the point of the union's liability was not even discussed in the court's opinion in the present case. *Schaad v. Barceloux*[20] permits a plaintiff to change his complaint from one stating an action in the conversion to one praying the specific recovery of shares of stock or

1038, 27 Sup. Ct. Rep. 618.
[17] (June 9, 1919) 57 Cal. Dec. 563.
[18] (June 23, 1919) 29 Cal. App. Dec. 9.
[19] (June 12, 1919) 29 Cal. App. Dec. 1385.
[20] (July 23, 1919) 29 Cal. App. Dec. 354.

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their value. The court very properly holds that the cause of action is not thereby altered. Hiner v. Hiner[21] is reaffirmed in *Mattson v. Mattson*[22] to the effect that it is unnecessary in an action for maintenance to aver the plaintiff's residence. A rather anomalous situation in suits against receivers is illustrated by *People ex rel. California Safe Deposit and Trust Company v. Magee*[23] which holds that the statute of limitations begins to run from the date of the accrual of the cause of action as in ordinary cases, notwithstanding the fact that the plaintiff must get leave to sue the receiver. "The obtaining of such permission is no part of the plaintiff's cause of action, but simply a step in his remedy."

Foreign corporations may not claim a residence in the State, nor demand a change of place of trial, under the provisions of the Constitution, to the county where an injury occurred, as may domestic corporations; it is so held in *Ryan v. Inyo Cerro Gordo M. & P. Company.*[24] A decision of much more general interest is that in *Atchison, Topeka and Santa Fe Railway Company v. Smith,*[25] adopting a liberal view in regard to bills of peace. The case should be carefully compared with Noroian v. Bennett,[26] commented on in a recent number of this Review.[27] In the case now decided by a District Court of Appeal, it is held that a railway company may enjoin the prosecution of more than six hundred actions pending in justices' courts brought against the railway company for recovery of excessive freight charges, and may obtain the relief of having them consolidated and tried in the Superior Court. There was no proof of fraudulent or oppressive conduct on the part of the defendants.

II. Commercial Law.

One might imagine that the long tilled fields of commercial and private law would cease to produce grist for the legal mill. But in fact the harvest remains as rich as ever. Well-established legal principles seem to be perpetually disregarded. People, for example, continue to go on agreeing to do things "to the satisfaction" of some one else, and then claiming when the time for performance arrives that they did not mean what they said,

[21] (1908) 153 Cal. 254, 94 Pac. 1044.
[22] (Aug. 16, 1919) 58 Cal. Dec. 133.
[23] (June 25, 1919) 29 Cal. App. Dec. 37.
[24] (June 26, 1919) 29 Cal. App. Dec. 41.
[25] (August 5, 1919) 29 Cal. App. Dec. 482.
[26] (1919) 57 Cal. Dec. 238, 179 Pac. 158.
[27] 7 California Law Review, 269 (May, 1919).

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as did the plaintiff in *Tiffany v. Pacific Sewer Pipe Company.*[28] Sometimes they escape the strict meaning of their words, especially in building contracts, but usually the courts refuse to make a contract for the parties different from that which they have chosen to express. This is what happened in the case referred to.

Much confusion exists in the minds of business men and lawyers as to the nature and effect of an account stated. *Bennett v. Potter*[29] dispels much of the fog surrounding the subject, though it merely holds that a written contract cannot be altered by a mere oral account stated. The opinion of Shaw, J., contains a valuable discussion as to the nature and effect of the account stated. Also involving the change of a written contract by parol, *Dodge v. Chapman*[30] decides that an oral agreement by a landlord to accept a decreased rent from his tenant, even where acted upon does not discharge a guarantor on the lease, for the reason that the modification does not constitute an enforceable obligation. Though both Bennett v. Potter and Dodge v. Chapman involve the interpretation of section 1698 of the Civil Code, as has just been said, the latter case does not refer to the section. The difference between an alteration of a contract such as discharges sureties and an unenforceable agreement to alter the contract is illustrated by *Nissen v. Ehrenpfort.*[31] There a guarantor of the payment of a promissory note was discharged by the payee's writing in the margin, with the maker's consent, a provision for payment of interest.

Several decisions in the law of sales of personal property are of interest. *Hamilton v. Klinke*[32] again decides that a crop not yet planted may be the subject of a chattel mortgage, taking priority over a sale of the crop when grown. If the Uniform Sales Act hereafter be adopted, the law on the subject of sales of goods in potential existence will be put in a better condition for the needs of commerce, but there will be required additional legislation to cover the situation of the chattel mortgage. Should the doctrine of potential existence ever have been applied where the lien theory of mortgage extends to chattels, as in California? It is interesting to observe that the earlier cases justifying the

[28] (July 5, 1919) 58 Cal. Dec. 35.
[29] (July 30, 1919) 58 Cal. Dec. 83.
[30] (Aug. 11, 1919) 29 Cal. App. Dec. 525.
[31] (Aug. 8, 1919) 29 Cal. App. Dec. 496.
[32] (July 28, 1919) 29 Cal. App. Dec. 409.

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doctrine that an ungrown crop may be mortgaged were decided before the Civil Code had extended the lien theory to the chattel mortgage. Another case involving the law of sales is *Pacific Western Commercial Company v. Western Wholesale Drug Company*,[33] holding that the right to rescind for breach of warranty is not lost by a resale, where the resale is made before an opportunity has been afforded to inspect the goods. *Silverston v. Kohler & Chase*[34] recognizes the right of the conditional vendor to retake the goods for default in payment of instalments on the contract, notwithstanding the vendor has sued for an instalment, provided, of course, that the retaking can be had peaceably. If, however, the vendor sues for the entire purchase price, he loses his right of recaption. Fraud in an agreement, consisting in one of several joint adventurers contracting for a secret profit, justifies a rescission, though the person seeking rescission has suffered no financial loss. *Menefee v. McDonald*[35] so decides.

Los Angeles Investment Company v. Home Savings Bank of Los Angeles[36] is an important case in the law of banking and commercial paper. The ultimate point on which the decision turned was that a banker could not justify the payment of checks on forged indorsements, but there are many important principles of banking law discussed in the opinion of the Supreme Court written by Mr. Justice Olney, and the case will doubtless be much cited hereafter. *Spotten v. Dyer*[37] is another case involving this branch of law. The decision is that the note was not negotiable, though in form complying with the law as to negotiability, because it was known by the purchaser to have been given as payment on a contract of which it was a part, upon a consideration which had failed. The case might as well have been rested upon the proposition that the purchaser was not a *bona fide* purchaser, but the court preferred to place its decision upon the peculiar rules of the California court—prior to the adoption of the Negotiable Instruments Law. The question of negotiability is, the court suggests, often dependent upon the fact whether or not the maker is estopped to deny negotiability.

Insurers and insured are affected by *Rossini v. St. Paul Fire*

[33] (June 23, 1919) 29 Cal. App. Dec. 25.
[34] (Aug. 18, 1919) 58 Cal. Dec. 138.
[35] (July 5, 1919) 29 Cal. App. Dec. 153.
[36] (June 19, 1919) 57 Cal. Dec. 612.
[37] (Aug. 8, 1919) 29 Cal. App. Dec. 503.

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and Marine Insurance Company.[38] A clause in a policy of insurance against keeping gasoline "on the premises" is not violated where gasoline is kept six feet away from the building insured. Nor does the fact that the insurer's risk is increased thereby, discharge the insurer, under the provisions of section 2755 of the Civil Code.

The "trust fund" theory was held inapplicable to the case of a "one-man corporation," where the president, who was practically sole owner, used the corporation's funds to pay his debts. Creditors of the corporation, who became such after this irregular diversion of its assets, could not complain, it was held in *Scales v. Holje,*[39] though creditors might have done so, if the company had owed them money at the time of the misappropriation. Another corporation case that deserves mention is *Slayden v. O'Dea,*[40] reaffirming the long line of cases holding a judgment against a dissolved corporation to be absolutely void. As was pointed out some years ago in this Review, none of these cases refer to section 404 of the Civil Code, which seems to lay down a definite rule opposite to that announced by the courts.[41] It looks as though the section referred to was intended to declare such judgments valid. Of course, if there has been an omission on the part of counsel to call the courts' attention to a plain statutory provision, the line of decisions referred to would have to be disregarded in favor of the plain language of the statute. The fact that section 404 of the Civil Code is tucked away in an obscure corner of that instrument may account for the fact that it has not yet been commented upon in any of the cases involving the point.

III. Property, Torts and Persons.

In spite of the increasing importance of administrative law, whose whole effect is to encroach on the field of private ownership, the courts of California are still flooded with a mass of litigation arising out of the ownership of property. Strange to say, some of these cases deal with situations which must frequently have occurred. Thus, *Oakland Bank of Savings v. California Pressed Brick Company*[42] decides for the first time a question that must often have arisen in practice—namely, as to

[38] (July 31, 1919) 29 Cal. App. Dec. 445.
[39] (June 25, 1919) 29 Cal. App. Dec. 34.
[40] (July 16, 1919) 29 Cal. App. Dec. 267.
[41] 4 California Law Review, 409.
[42] (July 3, 1919) 29 Cal. App. Dec. 132.

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the priority of right as between a conditional vendor of a machine which has been attached to land so as to become a fixture, and the *bona fide* mortgagee of the land. The court, following a marked tendency in earlier cases, resolves the question in favor of the conditional vendor of the chattel. The rule is not entirely satisfactory, laid down in the broad fashion in which the court announces it, though it may be appropriate under the facts of the case under decision. How about the situation where the conditional vendor has received practically full payment, and the bona fide mortgagee has not security sufficient to pay his mortgage if the machinery be detached? It would seem the latter ought to have a right of redemption of some sort; that the whole question should be determined upon the application of the broadest principles of equity. In another case, which involved a second mortgagee's rights in land, *Levy v. Levy Real Estate Company*,[43] these principles were liberally applied. Notwithstanding certain rather formidable *dicta* to the contrary, it was decided that a second mortgagee might have a receiver for rents and profits, though his mortgage did not cover them expressly, while the prior mortgage did. The decision rested upon the ground that the second mortgagee would probably be unable to protect himself against loss otherwise, because of the inadequacy of his security. Under the lien theory of mortgage, there would seem to be no reason to protect the prior mortgagee beyond the needs of giving him perfect security, while the mortgagor ought, of course, to pay his debt if he can out of the income of the land.

Muzio v. Erickson[44] is to the effect that an easement strictly defined must be attached to a fee simple estate. Therefore, there can be no true easement for the use of a stairway. Whatever relief the claimant of a right to use the stairway is entitled to, must be worked out through the doctrine that there is a covenant express or implied, to maintain it. The destruction by fire in this case relieved the quasi-servient owner from the obligation to rebuild. *Porter v. City of Los Angeles*[45] seems to hold that the cause of action for removal of lateral support of land accrues in California at the date of the excavation, not at the date of the damage, and further that the action for the wrong is trespass and not case. Both propositions come to one as something

[43] (June 30, 1919) 29 Cal. App. Dec. 94.
[44] (June 7, 1919) 28 Cal. App. Dec. 1310.
[45] (July 5, 1919) 29 Cal. App. Dec. 148.

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of a surprise. It is, indeed, a startling piece of legal information to be told that though no damage has yet occurred by reason of a neighbor's making lawful excavations on his land, the cause of action may be barred. Again it is difficult to understand how a common law action of trespass would have lain against a man for acts done wholly on his own soil. Possibly the present writer has misunderstood the court's decision and he therefore refrains from more severe criticism.

Coon v. Sonoma Magnesite Company[46] illustrates the difference between an "exception" and a "reservation" (though the court in its opinion does not use the words with technical strictness). A conveyance was made of land reserving to the grantor a defined strip of land "for a road." It was held that there was an exception of the strip, that the grantor retained the fee, and that he therefore might use it for any purpose he chose. Had it been construed as the "reservation" of an easement, it could, of course, be used for no other purpose than that of a road. *Brown v. Rives*[47] was also a case involving the execution of deeds, though it might more properly be classed as one involving liability for negligence. A notary public to whom a bank cashier introduced a person whose name appeared as grantor in a deed took an acknowledgement of the deed. Subsequently it turned out that the grantor was a fictitious person and that the person acknowledging the deed was a forger. In an action against the sureties of the notary by the vendee, it was held that there was no liability. There seems to be no reason to doubt that the notary acted reasonably, and should not be made liable in damages, nor his sureties held because of his honest mistake. The court's decision seems right on this ground. But the learned justice who writes the opinion says that the notary did exactly right; he took the acknowledgment of the grantor in the deed, though that grantor was a liar and a forger. This reasoning is most specious, and substitutes form for reality. It would result in the practical absurdity of relieving every notary who takes the acknowledgment of a stranger without any introduction such as was had in the case under comment. The acknowledgment becomes a useless ceremony.

Since section 3787 of the Political Code was amended in 1913, deeds to the State made upon sales for unpaid taxes have been

[46] (May 31, 1919) 28 Cal. App. Dec. 1250.
[47] (July 29, 1919) 29 Cal. App. Dec. 423.

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more useful muniments of title than previously. That section makes the deed conclusive evidence of the regularity of all proceedings from the date of the assessment to the date of the deed. But deeds made under the Street Improvement Bond Act of 1913[48] are only *prima facie* evidence of the regularity of such proceedings. It was accordingly held in *Chapman v. Jocelyn*[49] that a sale which did not include interest to the date of sale was void. There was also a failure to comply strictly with the form of notice required by the statute. In *Coleman v. County of Los Angeles*,[50] the Supreme Court decided another point of interest in connection with tax sales. Section 3898 subdivision 5 of the Political Code was interpreted literally according to "the equity of the statute," as they used to say in Coke's day. The subdivision referred to provides that when it is determined in an "action at law" that a sale and conveyance to a purchaser from the State is void, the full amount paid out by the purchaser for the property shall be repaid him. The Supreme Court very properly holds that the words "action at law" embrace a "suit in equity." One who will read the whole statute will be convinced of the correctness of the court's holding.

A new point, in this State at least, was decided in one of the most archaic of all branches of the law, the law of landlord and tenant. *Downing v. Cutting Packing Company*[51] holds that after a notice to quit is given, the landlord has no power to withdraw the notice until he gets the tenant's consent. In this case he accepted rent from the guarantor, which he was obliged to pay back, for the reason that the lease was at an end. *Harrelson v. Miller & Lux, Incorporated*,[52] determines that letting a third person feed his sheep on stubble on the leased land is not a violation by the tenant of the covenants against assignment and subletting.

Persons engaged in examining abstracts of title will be interested in *City Properties Company v. Fitzmaurice*[53] to the effect that a judgment lien arising from filing a transcript of judgment in another county is released not by the filing of a satisfaction piece, but by actual satisfaction. *Woodill & Hulse Electric Com-*

[48] Cal. Stats. 1913, pp. 849, 852, § 5 sub. K.
[49] (May 31, 1919) 57 Cal. Dec. 525.
[50] (July 9, 1919) 58 Cal. Dec. 60.
[51] (June 6, 1919) 28 Cal. App. Dec. 1275.
[52] (June 25, 1919) 29 Cal. App. Dec. 50.
[53] (June 28, 1919) 29 Cal. App. Dec. 90.

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pany v. Young[54] puts at rest a doubt that never should have existed in regard to the priority of liens attaching *in rem* by public authority, in particular, street assessment liens. It would seem self-evident that the latest of such liens should prevail, as the Supreme Court now positively decides. But Braly v. Burke[55] and other cases by what are now said to have been *dicta*, had caused uncertainty as to what the Supreme Court would hold.

In *Estate of Carraghan*,[56] it was urged that the homestead act of 1868 had not been repealed, and that under that act a homestead might be declared on land held in joint tenancy or in co-tenancy. The court held that the Civil Code repealed the statute of 1868, and apparently on the rule of *stare decisis* and not on principle, followed the decisions denying the power to declare a homestead on property so held. Possibly the decree adjudging a homestead made supplemental to a divorce decree silent as to property rights, was void on procedural grounds, as is held in *Lang v. Lang*.[57] But it is not clear at all, as the court holds, that the husband and wife became mere tenants in common in the homestead property upon the divorce. The homestead survives the death of one of the spouses, and it is not apparent why divorce should have an effect different from death, in dissolving it.

Cases between sellers and purchasers of land are common, most of them not involving points of peculiar interest. *La Chance v. Brown*[58] says that the loss by fire falls upon the vendor. This is a far cry from the generally prevailing rule. The doctrine of equitable conversion seems to be rarely invoked in California; the tendency seems to be toward applying legal doctrines rather than equitable ones to the treatment of contracts for the sale of land. *Lemle v. Barry*[59] states rather too broadly the principle that an imperfect title, where there has been no fraudulent misrepresentation, does not invalidate the contract of sale. And *Ratzlaff v. Trainor-Desmond Company*[60] inserts a rather peculiar limitation upon the doctrine of Joyce v. Shafer[61] by deciding that where the vendor not only sells the land which he

[54] (July 5, 1919) 58 Cal. Dec. 42.
[55] (1891) 90 Cal. 1, 27 Pac. 52.
[56] (Aug. 8, 1919) 58 Cal. Dec. 115.
[57] (June 25, 1919) 29 Cal. App. Dec. 31.
[58] (June 9, 1919) 28 Cal. App. Dec. 1350.
[59] (Aug. 7, 1919) 58 Cal. Dec. 107.
[60] (June 13, 1919) 28 Cal. App. Dec. 1398.
[61] (1893) 97 Cal. 335, 32 Pac. 320.

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has contracted to convey but also assigns the contract of purchase, he indicates an intention to abandon the contract. Lemle v. Barry[62] also clearly reaffirms the principle that the vendee cannot be put in default until a deed is tendered, even though time be of the essence of the contract. It seems necessary that this elementary principle in the law of contracts should be periodically re-stated.

Other cases concerning title to property, dealing with the equitable aspect of ownership rather than the legal are *Fidelity Savings & Loan Association v. Rodgers*,[63] *Smitten v. McCullough*[64] and *Williamson v. Williamson*.[65] The first illustrates the familiar principle that an incompleted attempt to make a gift cannot be supported as an equitable assignment; the second that one who accepts an equitable lien on personal property as security for a prior indebtedness is not a bona fide purchaser, but will take subject to an equitable lien prior in date; the third case holds that where a husband conveys land to his wife, the latter has the burden of proving absence of undue influence and the existence of a consideration.

A few decisions in the law of intestate succession are important. *Estate of Marshall*[66] settles that a step-child is an heir, though not of the blood of the person from whom he inherits, under subdivision 8, section 1386, of the Civil Code. Such a decision would have been impossible under common law theories, but the statute referred to has plainly abandoned blood-relationship as the test. In *Estate of Walker*[67] twins born within five months after an interlocutory decree of divorce were conclusively presumed legitimate, while in the *Estate of McNamara*[68] a child born 304 days after the mother's leaving her husband was not embraced under the conclusive presumption of legitimacy.

Norton v. Norton[69] is interesting for the reason that the instrument which in one aspect constituted a will, was also a contract. Estate of Hoytema[70] on the other hand, presented,

[62] Supra, n. 59.
[63] (July 5, 1919) 58 Cal. Dec. 39.
[64] (June 24, 1919) 29 Cal. App. Dec. 29.
[65] (June 24, 1919) 29 Cal. App. Dec. 22.
[66] (Aug. 14, 1919) 29 Cal. App. Dec. 553.
[67] (June 5, 1919) 57 Cal. Dec. 540.
[68] San Francisco Recorder, Aug. 29, 1919.
[69] (June 6, 1919) 28 Cal. App. Dec. 1428.
[70] (May 29, 1919) 57 Cal. Dec. 491.

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so the majority of the justices of the Supreme Court decided, the case of a testamentary instrument, formally perfect, without testamentary effect. The opinion of the three dissenting justices will, to many, seem the more convincing. *Estate of Moore*[71] holds that a will of later date may be admitted to probate more than one year after a will of earlier date has been admitted. The Chief Justice dissented on the ground that the decision was inconsistent with the theory that a decree admitting a will to probate is an *in rem* decree and establishes conclusively that the instrument admitted is the last will. The result of the decision, however, is a gratifying one, for it escapes establishing a formal rule of procedure which would prevent the real facts from being proved, without any compensating advantage in the way of securing stability for title.

A testator gave "to each of my sisters and brother living five hundred dollars." This includes only those living at the time of the testator's death, not at the time of the will's execution, it is decided in *Estate of Rounds*.[72] Possibly a somewhat artificial rule, but generally a useful and just one. A clause in a will for the purpose of discouraging contests provided that benefits given to anyone under the will were forfeited "where any attempt was made to defeat its provisions." The Supreme Court in *Estate of Bergland*[73] held that one in good faith presenting an alleged will for probate (which, however, was rejected) did not fall within the provision, a decision which is good sense, but difficult to express in terms of general principle. A condition in restraint of marriage, forfeiting benefits in case of the legatee's marriage to a particular woman, was involved in *Estate of Duffill*.[74] However, the marriage occurred before the testator's death, so that the condition subsequent could not be performed. The provision therefore never took effect. The case is important as being the first one to decide the question as to whom stock dividends should go in case of a life interest with a remainder over. The court holds that where paid out of earnings in the life tenant's lifetime they should go to the latter. If declared out of the *corpus*, they should go to the remainderman. The "United States rule" is followed rather than the "Massachusetts rule."

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[71] (June 19, 1919) 57 Cal. Dec. 591.
[72] (May 20, 1919) 57 Cal. Dec. 473.
[73] (June 20, 1919) 58 Cal. Dec. 6.
[74] (July 30, 1919) 58 Cal. Dec. 97.

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The crop of negligence legislation is large and the facts involved are frequently interesting. But as in questions of criminal law, the points of law involved are usually procedural. A few, however, deal with novel situations. *Roos v. Loeser*[75] decides that the owner of a pet dog may maintain an action against the owner of another dog, which attacked and killed his dog without provocation. The law of animals was also involved in *Opelt v. Al. G. Barnes Company*.[76] A ten-year-old boy climbed into the space between a leopard's cage and the circus tent. The owner was held not liable for the injuries inflicted by the leopard, because of the boy's negligence and assumption of risk. An owner of an automobile who lent the car to a third person whom he accompanied was held liable for the bailee's negligence in *Randolph v. Hunt*.[77] But an automobile owner is not liable where his chauffeur uses the car upon an errand of his own, according to *Gousse v. Lowe*.[78] The rather unusual situation of ratifying the tort of assault was presented in *Johnson v. Monson*.[79] The defendants who kept a saloon were held liable for an assault made by the bar-keeper upon a customer, upon the ground that they learned and approved of what he had done.

Orrin K. McMurray.

[75] (June 27, 1919) 29 Cal. App. Dec. 59.
[76] (June 27, 1919) 29 Cal. App. Dec. 61.
[77] (June 25, 1919) 29 Cal. App. Dec. 65.
[78] (June 24, 1919) 29 Cal. App. Dec. 19.
[79] (Aug. 15, 1919) 29 Cal. App. Dec. 570.

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Book Reviews

THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL. Harvard Law School Association. 1918. pp. x, 412.

To the graduate of the Harvard Law School this book will be a mine of treasure with its biographical sketches and portraits of the faculty, from Isaac Parker to Roscoe Pound; its illustrations of the school buildings, from the Webber House to Langdell Hall; its sketches of such familiar scenes as the stacks at Austin with Dean Ames' desk and the picture of John "at the Delivery Desk since 1883."

The history is compiled, however, in such readable style that it will interest any lawyer, and a glance at the list of distinguished judges, lawyers, and teachers among the alumni of the school will suggest the enormous influence the institution has had on the law of the country.

The early benefactors, Royall and Dane, of Dane's Abridgment, had the vision. Judge Isaac Parker and Stearns just barely failed in accomplishment. The realization began in the sixteen years during which Judge Story presided, with his learning, enthusiasm and prestige, aided as he was by the accurate and scholarly Greenleaf and the assistance of Ashmun and Charles Sumner. Then came Judge Joel Parker, Parsons and Washburn. The comparative failure at the end of this illustrious triumvirate taught a lesson that will never be forgotten. A school cannot stand still—if it does not progress it will surely fall back. The new growth came with Langdell; he instituted prerequisites for admission and for graduation, standards of teaching, new methods of instruction. The work of the "Big Four," Langdell, Ames, Gray and Thayer, to whom was later added Judge Jeremiah Smith, culminated about 1910. Mindful of the lessons of the past, Ezra Ripley Thayer was selected as Dean to carry on the new work, being succeeded on his untimely death by the present Dean, Roscoe Pound.

The school is now organized for service in solving the social problems of the time without losing the efficiency of the old legal training. This is being done without any violent break with the past. The great pupils of Langdell and Ames still remain—Beale, Wambaugh, Williston. The latest developments of juristic theory and history will be presented to the students not as something detached but as the natural method of instruction in the living law enforced by the courts of today. Above all, however, the reader of this history will feel that the greatness of the school depends, not on its building, its library or anything that money can buy, but in the indefinable spirit which has been created by a hundred years of devotion to the law by faculty and students.

A. M. Kidd.

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COMMERCIAL ARBITRATION AND THE LAW. By Julius Henry Cohen. D. Appleton and Company, New York. 1918. pp. xx, 339.

At common law an agreement for arbitration cannot be set up as a bar to an action brought in the ordinary way to determine a dispute which it was agreed to refer, although an action can be maintained for breach of the arbitration agreement; nor will such an agreement be specifically enforced. The parties may, however, make arbitration a condition precedent to any right arising at all. The author contends that these rules are anomalous in theory and unsound in principle. The treatment of the cases is rather bewildering, as they are criticised from the point of view of their accord with the theory of the author and not of their conformity to the established rules above set forth. The argument of the author is not entirely convincing. He fails completely to establish that the jealousy by the courts had anything to do with making the law. It would seem that this is a theoretical explanation invented before the real reasons had been discovered. Later investigation seems to account for most of the anomalies.

(1) Inadequacy of the remedy for arbitration agreements: As it was not until the end of the eighteenth century that a promise for a promise was generally enforced, it is not surprising that arbitration agreements were not binding. The analogy of the power of attorney seems to have been an attempt by the courts to give some effect to an arbitration agreement that under the early law it would not otherwise have had.

(2) Failure to enforce arbitration agreements except by separate action: This is nothing more than the well-known rule of Pordage v. Cole, which makes the various promises in an agreement independent unless expressly made otherwise. The law permits arbitration clauses to be made conditions precedent and in England since 1854 the court has discretion to refuse to entertain an action unless the arbitration clause has been complied with.

(3) Refusal to grant specific performance: Most agreements in English law are not specifically enforced anyway, so the rule as to arbitration is no exception. If a court of equity has to take jurisdiction to compel specific performance of an arbitration agreement it is more in accordance with its general principles to clean up the matter at once by settling the whole controversy.

In other words, arbitration agreements have been treated much like other contracts. Whether, as a matter of policy, the law is wrong and should be changed is questionable. If one of the parties to an arbitration agreement does not want to arbitrate he can put plenty of obstacles in the way. The arbitrators have not the writs, processes and other machinery of

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courts to compel a trial, secure the attendance of witnesses and enforce their orders. The experience of many lawyers has been that a submission to arbitration caused many difficulties of its own and ended in a lawsuit anyway. The great success of arbitration in England would seem to depend on several considerations. (1) The parties belong to an organization, like the Incorporated Oil Seed Association, which handles between five and six thousand arbitrations a year. (2) These organizations secure the performance of the arbitration clause by the public opinion in the trade, which would ostracize a man who violated his agreement; also such organizations have powers of suspension or expulsion. There are rules of the stock exchange, for example, which no member can infringe with impunity. (3) In these trades there are a number of men with the knowledge, time and willingness qualifying them to act as arbitrators. (4) The matters in dispute involve the business understanding of the trade rather than general legal principles.

Lacking the above conditions, it is not probable that arbitration can be made a panacea for general disputes. We can agree with the author, however, that arbitration should be encouraged within the groups that have the prerequisites therefor; that litigation should be discouraged and adjustment of disputes facilitated by arbitration and by all other practicable means.

In the appendix will be found some rules for the prevention of unnecessary litigation, being the report of the Joint Committee of the Chamber of Commerce of the State of New York and of the New York State Bar Association.

Mr. Cohen is performing a valuable service in supplying materials for the education of the profession and public in methods of facilitating the settlement of disputes.

A. M. Kidd.

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CRIMES AND CRIMINALS. By C. A. Mercier. Henry Holt & Co., New York City, N. Y. 1919. pp. xvii, 290.

MENTAL DISEASES. By L. H. Gulick. C. V. Mosby Co., 801-9 Metropolitan Bldg., St. Louis, Mo. 1919.

NEGOTIABLE INSTRUMENTS, CASES ON. By Zechariah J. Chafee. Published by the Editor, Langdell Hall, Cambridge, Mass., 1919. pp. 106.

WORKMEN'S COMPENSATION LAWS OF VIRGINIA AND WEST VIRGINIA. By James F. Minor. Michie Co., Charlottesville, Va., 1919. pp. xci, 691.

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